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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1909

No. 200

FLOYD G. AFFOLDER, PETITIONER,

vs.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 14, 1910.

CERTIORARI GRANTED OCTOBER 24, 1910.

United States Court of Appeals,

EIGHTH CIRCUIT.

No. 13,858.

CIVIL.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, A CORPORATION,
APPELLANT,

vs.

FLOYD G. AFFOLDER,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 9, 1948.

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit at the May Term, 1949, of said Court, before the Honorable John B. Sanborn, the Honorable Walter G. Riddick and the Honorable John Caskie Collet, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 9th day of November, A. D. 1948, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in a certain cause wherein New York, Chicago and St. Louis Railroad Company, a Corporation, was Appellant, and Floyd G. Affolder was Appellee.

Printed record, filed November 22, 1948, on which the appeal was heard in the United States Court of Appeals for the Eighth Circuit, is in the words and figures following, to-wit:

[fol. 1] Notice of Appeal.

(Filed August 11, 1948.)

In the District Court of the United States
for the Eastern Division of the Eastern
Judicial District of Missouri.

Floyd G. Affolder,
Plaintiff,
vs.
New York, Chicago and St. Louis Railroad Company,
Defendant.
No. 5773
Div. No. 2

Comes now the defendant, New York, Chicago and St. Louis Railroad Company, and files this notice of its appeal from the judgment of this court in favor of the plaintiff and against the defendant in the amount of Ninety-Five Thousand Dollars ($95,000.00) entered in the above cause June 9, 1948 and modified by voluntary remittitur by the plaintiff of Fifteen Thousand Dollars ($15,000.00) August 2, 1948 pursuant to this court's order conditionally overruling defendant's motion for a new trial and overruling defendant's motion for judgment, entered July 28, 1948. The appeal is taken to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

JONES, HOCKER, GLADNEY AND GRAND,
and
LON HOCKER, JR.,
Attorneys for Defendant,
407 North Eighth Street,
St. Louis (1), Missouri.

[fol. 2] Docket entry showing filing of notice of appeal and mailing copy of such notice to attorney for plaintiff.

(August 11, 1948.)

Notice of appeal of defendant to United States Circuit Court of Appeals, 8th Circuit, from judgment entered herein June 9, 1948 and modified by plaintiff's voluntary remittitur filed August 2, 1948 pursuant to order entered July 28, 1948 conditionally overruling defendant's motion for new trial and motion for judgment, filed and copy of aforesaid notice forthwith mailed by the Clerk of the Court to Mark Eagleton, Esq., attorney of record for plaintiff. Supersedeas bond of defendant on aforesaid appeal in the penal sum of $90,000.00 presented and order thereupon filed and entered approving said bond and staying execution of judgment pending determination of aforesaid appeal. Aforesaid supersedeas bond of defendant, filed.

[fol. 3] Complaint.

(Filed February 19, 1948.)

State of Missouri } ss.
City of St. Louis }

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Floyd G. Affolder, Plaintiff,

vs.

New York, Chicago, St. Louis Railroad Company, a Corporation, Defendant.

Cause No. 5773.
Court No. 2.

Comes now plaintiff, Floyd G. Affolder, and for his cause of action states:

1. That the jurisdiction of this court is founded on the fact that the cause of action arises under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. Sections 51-60) and the Federal Safety Appliance Act (45 U. S. C. A. Sections 1-46).

2. That the defendant, New York, Chicago, St. Louis Railroad Company is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of law, and did own and operate a railway system and lines, tracks, yards, engines and trains as a common carrier of freight and passengers for hire, and [fol. 4] was at all times herein mentioned engaged in interstate commerce and transportation by railroad, and that defendant now has and at all times herein mentioned had an office and place of business in the City of St. Louis, State of Missouri.

3. That on and prior to September 24, 1947, plaintiff was a servant in the employ of the defendant in the capacity of switchman, earning approximately $400 per month with good chances of advancement.

4. That a part of the plaintiff's duties was in furtherance of the [interestate] commerce transportation business of the defendant, and that by reason thereof the plaintiff and the defendant at all times mentioned herein were subject to the terms and provisions of certain statutes of the United States of America then and there in full force and effect relating to the liability of interstate common carriers by railroad for injury to and death of their employees, which said statutes are commonly known as and referred to as the Federal Employers' Liability Act (45 U. S. C. A. Sections 51-60) and the Federal Safety Appliance Act (45 U. S. C. A. Sections 1-46).

5. That under the aforesaid statutes it became and was the absolute duty of the defendant not to have nor permit to be hauled or used on its lines any car not equipped with couplers coupling automatically by impact.

6. That on or about September 24, 1947, plaintiff was a member of a switching crew which was engaged in switching various cars on defendant's tracks located in the Fort Wayne, Indiana, yards of the defendant; that while plaintiff was thus discharging his duties in the course and scope of his employment as switchman for the defendant, two of said cars then and there failed to couple together automatically by impact, and by reason of said failure a cut of [fol. 5] cars was caused to move on one of said tracks and one of said cut of cars was caused to strike and run over

plaintiff, all of said cars being then and there hauled and used on its lines by the defendant.

7. That defendant disregarded and violated its duty and then and there was hauling and had in use on its lines said cars which were then and there not equipped with couplers coupling automatically by impact, in violation of said Safety Appliance Act (45 U. S. C. A., Sections 1-46).

8. That as a direct and proximate result of the defendant's failure to have said cars equipped with couplers coupling automatically by impact, in violation of said Safety Appliance Act (45 U. S. C. A., Sections 1-46), plaintiff was seriously and permanently injured and damaged in the following respects: that plaintiff's right foot and right leg were amputated; that plaintiff's right foot and right leg and the various parts thereof were mangled, crushed and injured; that plaintiff's nerves and nervous system were severely shocked and injured; that plaintiff has suffered, is suffering and will in the future continue to suffer severe pain of body and anxiety of mind; that plaintiff has been disabled from performing his duties and his ability to work or earn in the future will be permanently weakened, impaired and destroyed; that plaintiff at the time of his injury was earning approximately $400 per month; that plaintiff has lost all of said earnings to date, and will in the future continue to lose all or a greater portion of said earnings; that said injuries are serious and permanent, and the function and use of all the aforesaid parts and organs has been permanently weakened, im- [fol. 6] paired and destroyed; all to plaintiff's damage in the sum of One Hundred and Fifty Thousand Dollars ($150,000), for which sum, together with his costs, plaintiff prays judgment.

(Signed) MARK D. EAGLETON,
Attorney for Plaintiff,
3746 Grandel Square,
St. Louis (8), Mo.,
Telephone Jefferson 4050.

Served on February 20, 1948.

[fol. 7] Answer.

(Filed March 18, 1948.)

Comes now the defendant, and for answer to the plaintiff's complaint admits, denies and alleges as follows:

1. Defendant admits the allegations of Paragraph 2; and so much of Paragraph 3 as alleges the employment of the plaintiff by the defendant; Paragraph 4; so much of Paragraph 6 as alleges that on September 24, 1947 plaintiff was a member of a switching crew engaged in switching cars on the defendant's tracks at Ft. Wayne, Indiana, but denies all the other allegations of fact set out in the plaintiff's petition.

Wherefore, the defendant prays to be dismissed with its costs.

JONES, HOCKER, GLADNEY AND GRAND,
and
LON HOCKER, JR.,
Attorneys for [Defendants],
407 North Eighth Street,
St. Louis (1), Missouri,
Garfield 3850.

Copy of the foregoing Answer served this 17 day of March, 1948, by mailing a true copy thereof to Mark D. Eagleton, 3746 Grandel Sq., St. Louis, Mo.

LON HOCKER, JR.

[fol. 8] Transcript of Evidence and Proceedings.

(Filed October 25, 1948.)

District Court of the United States
Eastern District of Missouri
Eastern Division

Floyd G. Affolder,
Plaintiff,
v.
New York, Chicago & St. Louis Railroad Company, a corporation,
Defendant.
No. 5773
Court No. 2

During the March Term, A. D. 1948 of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, at the trial of the above entitled and numbered case, commencing on June 8, 1948, before

Honorable Rubey M. Hulen,

one of the Judges of said Court, and a jury, in his court room in the United States Court House at St. Louis, Missouri, the following proceedings were had:

Appearances:

For Plaintiff, Mr. Mark D. Eagleton.

For Defendant, Mr. Lon Hocker, Jr., of the law firm of Jones, Hocker, Gladney & Grand.

[fol. 9] A jury was duly empaneled and sworn.

And Thereupon counsel made their opening statements to the Court and the jury.

[fol. 236] The Court: Statement on behalf of plaintiff.

Mr. Eagleton: May it please your Honor, gentlemen and ladies of the jury, so as to assist you in listening to the

evidence which will be put on the stand shortly, so that you will grasp the significance of that evidence when it is introduced, it is my privilege at this time to tell you the facts that will be disclosed on behalf of the plaintiff, remembering, of course, as you will, that what I say is not evidence, but merely my own thoughts of what the evidence will be. Evidence, strictly speaking, comes only from the witnesses and not from counsel.

The evidence on behalf of this plaintiff will show that Floyd Affolder, who is a young man thirty-five years of age, had been in the employ of the Nickel Plate Railroad, as it is called—the New York, Chicago & St. Louis Railroad, I think is the corporate name of it—at Fort Wayne, Indiana, for approximately seven or seven and a half years prior to the time that he was injured on September 24, 1947, in the early morning. It was about 3:30 in the morning. He was working on the so-called "night shift," going to work on that night shift about 11:00 o'clock at night and getting off ordinarily about 7:00 in the morning. [fol. 237] They were at this particular time in the Fort Wayne yards with their usual crew, comprised of five men; that means an engineer and a fireman, two switchmen, and a foreman. The switchmen are sort of divided by location: one is called the head switchman or head brakeman, and the other is called the field man. The term "head brakeman" does not mean he is the superior of the two; when we speak of head brakeman, it is not used in that sense; "head" means he works closer to the head end; in railroad parlance, that is the engine end; one works close to the engine; the other one works out in the field. The foreman handles the list and determines the manner and method of doing the switching and what tracks are to be used for that purpose.

In a brief sort of way, these yards run east and west, and the engine was working at the west end of the yards, as distinguished from the east end; however, all of the tracks more or less run in a general direction east and west, and the track that is here involved was called the eastbound main, which is an east and west track on which, prior to the accident, they had put some twenty-nine cars, I believe—that is my recollection—maybe one or two more or less—and they had one more car to go in on that track,

the twenty-ninth car apparently was so close to the switch point at that west end that when they went to put or thought of putting this other car in at the west end, there was no room for it without fouling the switch; in other [fol. 238] words, you have got to leave enough clearance as you shove your cars in on a particular track, you leave enough clearance so that the car, when in there, it is in the clear, so to speak. Otherwise, you might get in on the track all right, but enough of it would be extending so it would be fouling that switch there, and another train coming by would hit it, wouldn't have enough clearance, so whenever you put cars in on a track, it becomes necessary to shove them down far enough away from the switch point that there will be ample clearance.

That was the situation that was discovered shortly before this accident, that they needed to put one more car at the west end that was wanted on the eastbound main, and then after that car was set in, assuming it had been put in successfully, they would after that time make a few incidental switching movements, and then pull that track.

That pull, when we speaking about pulling the track, that means pulled, all the cars that have been placed in the track are pulled out together in a unit and taken over to the north side of the yard where that particular group of cars was to go.

Now, when they started these movements, the first group of cars that went in on this eastbound main, I believe, went into the group of some nine or ten cars, were shoved in there by the engine.

[fol. 239] Now, we are talking about shoving. You are shoving, you have your engine coupled to the unit of cars, whether they be four, five, ten or more, and your engine is kicked against those cars, and by this force of shoving the whole group of cars is moved. That is distinguished from pulling in or heading in; pulling the track would not be this shoving; and that shoving is to be distinguished in your minds, because these railroad men use those terms rather frequently, from kicking.

When you kick a car in on a track, what is done, you cut it loose by its drawbars or couplers, then you kick it in by the force of the engine running behind it, getting

a kick, you let it run on down. Sometimes they will kick one car, sometimes they will kick two cars, sometimes they will kick three cars. That is kicking, where the engine goes on. Whenever you hear the word, it should be distinguished from shove, where the engine sets against the group and shoves on west.

When they went in on this track—that, incidentally, is what we call a gravity track; by gravity, I mean it slopes from the west where the engine is doing the work, putting the cars toward the east, toward the opposite end of the yard, so it slopes down to maybe some drop of four feet from one end to the other, maybe more than that; anyway, it was rolling or declining to the east. When they put their cars in this track, there were eight or ten cars there [fol. 240] shoved in together, and that being the rear end of the movement as distinguished from the head end. Affolder, the plaintiff in this case, went down to the rear end, which would be the eastern end, and tied down the brake, as they use the term, tied down the cars by using the brake. He gets on the car, the end car or the one next to it, whichever he thinks has the better brake, in his judgment, and he ties that brake and sets the brake so that the cars will stand still when the other cars are kicked down against it, and then the first group goes in is tied down, then the second group kicked in will hit against those cars and yet not disturb their relationship, because it is tied down, so to speak.

Now, he tied down on the east end, Affolder did, and he tied down cars, and his tying them had been very successful, because thereafter the string of cars went in there, there were more than, oh, eighteen or nineteen cars that were kicked in that, one after the other, at the west end, without anything happening. Then when they had worked all but probably this one car to go in at the west end, they discovered they did not have enough room, so they put a car at the west end of the track, shoving the whole track; it wouldn't do any good, just kicking the car, you leave it stand up where it wasn't clear, so they had to shove that whole group—I believe there were twenty-nine cars in the group at that time, and when they shoved with the [fol. 241] engine, the engine had two or three cars attached to it that were not going in on that track but were

nevertheless attached to the engine—they shoved these cars along; the front or the cars down below separated, they separated, I think, between the twenty-fifth and twenty-sixth cars that were on the track; and that is the point in the case, that the plaintiff says that that separation was due to the fact the couplers did not couple automatically by impact, which they are required to do.

Now, we will show by impact simply means that if you put two cars together, push them together, that they couple automatically by impact, so that there isn't anything further to be done.

In this particular instance, the man who was doing the coupling of the cars, kicking them down there, cutting them at least, was the head man, a man by the name of Tielker, and I think the evidence will show that when he went to kick this particular car down where the separation occurred, the twenty-sixth car was a Pennsylvania hopper car, that is a coal car, as distinguished from a box car; the one next to it, immediately east of it, was a Rock Island box car, and when he sent the Rock Island box car, which went down ahead of the hopper car, at the beginning of the movement, he used the cutting lever at the west end, there is a lock here at the end of the car, the opposite end; in other words, at one corner, then at the opposite corner diagonally. So the cutting lever [fol. 242] was used at the west end and sent it on down. When he came, it was then his duty later, when he sent the box car, to see that the east end of the hopper car, the Pennsylvania hopper car, that that hopper car was open, because if you have two closed knuckles, if both knuckles are closed, locked in position which may be closed, and they hit something closed, of course they won't couple; but if either one is open, or both are open, they mesh like that (indicating), or something like that, or if one is open, they grab like that (indicating). So he is sure to open the knuckle at the east end of the Pennsylvania hopper car, although he had already opened the knuckle on the west end of the Rock Island car, and which they want, of course, both ends be open—you don't have to have but sometimes a car in going in there, which joins to the others, it will cause the knuckle to close at the opposite end; in other words, the grade which it goes down,

moving it against this car here, the coupling should make, whoever watches, coupling at this end might close, due to the impact back here, so to be sure of that he opened the east end knuckle of the Pennsylvania car. I believe he saw at that time, when he went to open it, he saw a bad-order tag on the car, and when he went over to open the knuckle, he had great difficulty in opening it; he had to force down on the lever rod some two or three times, and it was discovered that the lever rod that runs back to the pin was bent and defective in that sense.

[fol. 243] You see, when they come together like that (indicating), a pin drops down and inserts itself, and that pin is what holds it in there, and if the pin does not drop down, you have got simply two pieces of iron together, that when they lock, that is what is called a locking device, and the operator discovered that operating lever rod leading back to that pin was bent, or defective, or something like that. At any rate, when they shoved down with this train, we don't know, of course, plaintiff does not know, he does not attempt to tell you what made them fail to couple, because he hasn't any idea, that is not his job, and he knows nothing about that, he doesn't know what made them fail to couple; he knows they did fail to couple.

Mr. Hoeker: Well, I will object to the comment, your Honor, that that is not his job. I expect to take the contrary position.

The Court: Sustained at this time. Proceed.

Mr. Eagleton: The plaintiff, in doing his work as a switching employee, he doesn't know why they failed to couple, but they did not couple, and as the result of that failure to couple, that car was shoved, instead of shoving it with a unit of twenty-nine cars that would go down to the east end, as I say, by the failure to make coupling by impact of this one car, the separation occurred, and the cars on the east end back to the twenty-fifth car came [fol. 244] rolling away, and of course, the cars at the west end that were attached to the engine, they would stay with the engine, because the engine would hold them there, but the cars the engine did not have hold of, when the separation occurred, would then roll away down to the east.

It was the plaintiff's duty, under those circumstances, to go after the cars, to tie them down, in line with his duty, to overtake the cars and to see that no further damage was done, no injury occurred at the east end, and they did not interfere with work that might be going on there, or probably damage the persons that might be crossing, or anything else. Right up until that time he had been riding the cars down the tracks that were immediately south of this eastbound main. He was riding cars. By riding cars, they kick cars loose, whenever they have to put a brake, he would go by tightening the brake, to keep the collision from occurring, or something else; so when he noticed this separation, he ran over from the place where he was, near track No. 7, he goes over, goes to tracks 8, 9, 10 and 11, then comes the eastbound main. He ran over to the north in order to get on the cut of cars, so as to keep them from rolling away, as they were doing, and when he got over next to the cars, his foot—one of his feet stepped on some object that was hard, says that it felt like a piece of iron sort of rolled with him, and as it did, that pitched him forward in between the ends of the cars, and he grabbed to try to hold himself, to keep from [fol. 245] pitching ahead, but was not successful, and he went down under, and the truck of the end car, I believe it was the Rock Island car, ran over his leg and practically amputated his leg.

Now, I think the evidence will show that when he got to the hospital the leg was hanging by some sort of a shred or thread, and he was given something to take while they amputated the rest of the leg.

He was in the hospital more or less steadily, with the exception of a day or two off Christmas, when he was allowed to come home until some time in January.

The leg kept on draining until the time it closed, I believe some time in April. But during that time he had a structure of some kind that was in the nature of weights on the stump, to kind of stretch that stump as well as they could—until after the swelling had gotten out of it, to reduce the swelling, and his stump at this time, it will be shown to you, is a four-inch stump, begins about at the hip here and goes down about four inches is all that is left of

his right leg. In the center of it, there is a very sensitive place called, I think, by the doctors a "hot spot" immediately over the bone or near the bone. It will be necessary for him to go back some time, as soon as his nerves can stand the ritual of going into a hospital again, it will be necessary for him to go back and have more bone taken out of that stump, in an effort to see what can be [fol. 246] done with reference to wearing an artificial leg.

At this time, his nerves and his reaction to the injury, he is just jumpy and despondent, and has crying spells and one thing another, and he can not go back now and won't go back until his physical condition will permit, then he will go back, make an effort, try to take out some more bone, have it over, and see if anything can be done for the artificial leg.

Now, the records show, I think, his earnings at the time of this accident were about $400.00 a month. He earned, from the 1st of January, 1947, down to the time when he was injured, approximately, in round figures, $3,593.00, some such amount as that, or practically $400.00 a month, from September 23, 1947, which was a little less than nine months. Only a week less than nine months.

Those jobs are run on a seniority basis, and he had already qualified some time back as conductor—freight conductor, he qualified, and as a conductor, I think, since about 1942, or 1941, and he would have full seniority of rights to be promoted, and as conductor would get a higher scale of wages under those circumstances.

Now, if I show you that this man was injured as I have indicated, through no fault whatsoever of his own, due to the failure of these couplers to operate and function properly, if we show you that, we will expect at your hands a [fol. 247] verdict in the amount sued for in this case, which is $150,000.00.

Mr. Hocker: May it please your Honor, ladies and gentlemen, as Mr. Eagleton has told you, the purpose of our telling you now what the case is about is, of course, to let you know what the issues will be and, in general, what the evidence will be, so that you will understand it better as it comes piecemeal from the witnesses.

Now, all of you ladies and gentlemen have served here before, are undoubtedly familiar with courtroom procedure, and perhaps that statement is unnecessary.

In this case, of course there is no doubt about the question of Mr. Affolder's serious injury. He did lose his leg. There isn't any issue regarding the seriousness of that injury. The railroad has given him excellent hospital and medical care, and nursing care, ever since this injury occurred, which was only last September, considerably less than a year ago.

He lives in Fort Wayne, all the witnesses live in Fort Wayne, and the accident occurred in Fort Wayne; the action was brought here in St. Louis to try before you Missouri residents.

The issues that are presented to you by the pleadings in the case respecting the question whether the railroad is liable for this injury to Mr. Affolder, that is solely and simply the question of whether the railroad complied with [fol. 248] the federal statute which requires that railroads not utilize cars on their roads which are not equipped with couplers coupling automatically by impact. We are obliged to do that under the statute.

There is no question here of negligence; we are not charged with negligence in any degree; so the sole charge and sole issue for you on the question of responsibility is the question of whether these cars were equipped with couplers operating automatically by impact.

Now, on that issue, ladies and gentlemen, there is considerable evidence that will be before you. In the first place, the night that Affolder was injured, he was, of course, so seriously injured that he could not tell anything about how that accident occurred; no one was thinking at that time about how the accident occurred; he was losing blood, and losing blood very fast, and the primary problem was to get him to the hospital to save his life, which, of course, was done; and the only comment made at the time by Affolder was something about an Ajax brake.

Now, an Ajax brake is a little different brake than the power brake on a freight car. It has a great deal more leverage than the average horizontal brake that you see on the back of an ordinary box car; it has a vertical wheel

and considerably more diameter to it, has a good deal more force, and there was an Ajax brake on the second car of the [fol. 249] —what shall we call it—the east end of the cut —railroad men speak of a cut of cars or string of cars. The east part of the cut, that is, the east part of the cars beyond the separation. The second car was a Norfolk & Western car, which was equipped with an Ajax brake.

The car on the west end of the east part of the cut was a Rock Island car, and it had an ordinary horizontal brake.

Now, as Mr. Eagleton has explained to you, these couplers are so designed that if either knuckle is open—they speak of the knuckle as a coupling—if either knuckle is open, they will lock on impact. When the closed knuckle hits the open knuckle, it rotates the open knuckle to a closed position, and as it drops to a closed position, the lock, as it is called, or sometimes called, the pin drops down and locks the knuckle in place. If both knuckles had been open when they hit, both knuckles would have closed, both pins will drop.

Now, as the evidence will show, the only persons that can tell you anything about this condition of the knuckles before or after, immediately before or immediately after the accident, are Tielker and Millikan. Tielker and Millikan are brakemen, they are in the courtroom. Tielker is the brakeman who was operating near the engine. Sometimes they call him the pin puller in switching movements. Affolder was the field man, the one working away from the [fol. 250] engine, and Millikan was the conductor, as he is called, or foreman of the switching crew, and they will testify, as Mr. Eagleton has indicated, that he opened the pin on the Rock Island car when he kicked it down previously, and that the knuckle probably closed when the car kicked up against the other side of the string of cars that was then on the east side of the track. Then when he—he said that when he put in the Pennsylvania hopper car, he opened the knuckle on that car and they kicked it in there. Now, that will be a matter which will be in dispute and which you will have to resolve from all the testimony.

Now, let me tell you a little bit about the yards there, ladies and gentlemen. This is an average freight yards—

I might say it is a division point on the Nickel Plate—right in the middle of the north part of Indiana. There are two yards, you might say, and the east and westbound main tracks, which extend, of course, east and west—the south yard and north yard, and the south yard is subdivided into two parts—we needn't bother about that; in any event, the main traffic goes across about the middle of the yard on the east and westbound main track.

Now, this crew, that is, the switch crew, was doing classification work this night. Classification means that a switch crew takes all of the cars that come in from every part of the road and are up in the yard. Now, some of those cars, I might say, will be destined to one place, other [fol. 251] cars will be destined to another, and it is necessary to reclassify, reshuffle those cars to make up the trains that are leaving the division point for different destinations, also to take any cars that have any defects and put them on the repair track, because, of course, they could not be repaired if they stayed in the switch track.

Now, what this crew was doing was putting on the east bound main, the longest track in the yard, that is, the longest between switches, it would hold the most cars without fouling any other switches, and making it impossible to use those tracks. This track, the testimony will show, will hold about forty-four cars, the eastbound main, it was the longest track in the south part of the yard.

There were no eastbound trains due through there, and consequently they were using this eastbound main track as a track on which to put all of the cars which were subsequently destined for the north yard. There were a great many cars on, I guess, thirteen tracks south of the eastbound main, and it was necessary to classify those by taking out the cars that were destined for the north part of the yard and putting them on this eastbound main, I believe, when they intended to take all the cars on the eastbound main, going way down to the crossover of the westbound main, thereby going in the north part of the yards and then move them into the repair tracks and the tracks where the trains were made up that were westbound [fol. 252] yard, they couldn't go out from the south yard west, you couldn't move the last one to the repair track, they would have to move over to the north yard.

Now, among the cars that were destined for the north part of the yard were the cars which were, as we say, bad-ordered. If a car is in bad order, it is bad-ordered, it must be repaired, depending upon the type of bad order that the car is in, it can not move, more or less.

There are two kinds of cards—bad-order cards—a red one and a white one, and the red one is used for cars that have a condition, the cause of their being bad-ordered is a violation of this federal statute under which this suit is brought. There are certain things that you must have on a card, one of which is this coupler automatically operated, and others, for example, are the grab irons, they have to institute grab irons, and several things. Those cards are red bad-order cards. That means you must have them repaired right away.

Another defect one of these cars had involved a door, the load had shifted and the door had bulged out there; well, that did not interfere with the operation of the car, but you had to correct that, so we corrected that. One car had to have its terminal bearings repacked with some grease and rags, and perhaps change brasses. That has been done, further show another notation of work. One of those cars was bad-ordered because it had to be repacked.

[fol. 253] Now, how many of the cars were bad-ordered, I don't know how many of them, but as always happens when a train comes in, the inspector looks over the train, and if he sees anything wrong with any of the cars, he bad-orders it, puts a card on it, "bad order", and checks here what you need, to repack journal boxes, or whether broken board on the side of the car or whatever might be needed.

Now, as soon as you mark that bad order, then it is the job of the company to get that in the repair yard for repair, and of course, their chief inspector receives car reports made daily by the car inspectors who inspect the direct repairs to be done, although the original inspector should find only one thing wrong with the car, and then as far as he is concerned, that goes in their repair yard.

Now, we will show that in this classification movement, the real way and the safest way to get these cars to the repair track—marked "bad order"—was to put them

somewhere on the eastbound main and then to take them all in one movement across the crossover and to the repair track, that is, to the north yard for the repair track. It would be manifestly impossible to take each bad-order car as you come to it and go direct to the repair track with each car, because it would necessarily require moving each car over the same track which you would ultimately move all the cars together, fouling both the eastbound and north-[fol. 254] bound main, and fouling all the tracks in the north part of the yard time and time again as each car was moved over separate.

Now, then, on this particular occasion, the car had been put into the repair tracks, into the No. 6, into the eastbound track, which I think will be agreed No. 12 in the south, or No. 13, I don't remember—it doesn't make any difference in the outlook—and had set a brake at the far end of that track. There were twenty-eight cars in that eastbound main, and there was just room for half a car on the eastbound main, and then that, of course, was not enough, because they had to put one more car in, and the last car that they put in, when they put it up with the other cars on the eastbound main, they saw that fouled the lead, or, rather, the track, they had to move that car a half a car length east, in order to get all the cars on the eastbound main. So the conductor had the engineer move the entire cut of cars. Now, that movement was a very slow movement—I don't know—two miles an hour maybe—just enough to move a half a car length. The cars are locked at the far end. This track will hold forty-four cars. There are only twenty-eight cars in the track. The twenty-ninth is this extra car that they were putting in.

It is true that there is an incline at that point, a slight incline. We will have a plat here. There is a slight incline at that point, but down, oh, maybe two hundred feet or three hundred feet from that point, the track is level [fol. 255] and continues level 1700 feet to the other end of the yards, almost nearly half a mile, I would say, to the end of the yards, the track was substantially level. You will have a chance to see that elevation.

Anyway, the shove movement was made to move these cars down, and the separation occurred.

Now, Affolder never did set any other brake than the

brake he had previously set on the car, and the separation, after the accident was over, was, according to the testimony, about four car lengths, so that at the far end the cars only moved four lengths farther than the engine and its cut of cars did, so that you can see that the movement was a very slow movement at the time the accident happened.

Now, Affolder was in No. 7 track, as I understand it, at the time this accident happened. And this happened on—he was at No. 7 track—north, I guess that is where it was, it was four tracks away, and when this separation occurred, he said he ran across the intervening—this was dark, early morning, flood lights there, not like daylight, of course—he ran across that intervening distance and attempted to board this car. And it was in that movement that he fell and was injured.

Now, you will have these two issues to decide from the evidence:

First, was this coupler defective, in the sense of [fol. 256] the statute, that is, did it fail, was it such a coupler as would not couple automatically on impact? That is the first issue here.

As the second issue, was the injury as a result, as a direct [an] proximate result of failure to couple, or was he injured by virtue of his own determination and his own action after the failure to couple had occurred, after the cars had started to move, which got him across that intervening space or tracks in the dark and led him to conclude to attempt to board that car, that moving car in the yards there, the freight yards, knowing the condition of the yards with respect to light and condition of light underneath the cars?

Now, those issues you ladies and gentlemen will have to decide in this case. Thank you.

[fol. 9] (Recess, ten minutes.)

Mr. Eagleton: Shall we proceed, if the Court please? Mr. Affolder, will you come around, please?

And Thereupon the plaintiff, to sustain the issues in his behalf, offered the following evidence:

FLOYD G. AFFOLDER,

the plaintiff, of lawful age, being duly produced, sworn and examined, testified in his own behalf, as follows:

Direct Examination

By Mr. Eagleton:

Q. Mr. Affolder, when you answer questions that will be put to you, I wish you would speak as clearly as you can, so that each of the jurors will be able to hear you, and if for any reason you don't quite catch the question or the significance of it, why, I am sure that either of us will repeat the question, if you will indicate. What is your name, please? A. Floyd G. Affolder.

Q. You have got a good, deep voice. I think you can be heard all right. How old a man are you, Mr. Affolder?

A. Thirty-five years old.

Q. And where do you live? A. 663-½ Third Street.

[fol. 10] Q. That is in Fort Wayne, Indiana? A. Yes, sir.

Q. You were injured, I believe, on September 24th, was it, 1947? A. Yes, sir.

Q. In the early morning of that day? A. Yes, sir.

Q. About what time in the morning was it?

A. About 3:30 or 4:00 o'clock, around there.

Q. In the morning? A. Yes.

Q. What time had you gone to work the evening before?

A. 10:45.

Q. That is the regular time of starting work therein that yards? A. That is the regular time for that engine.

Q. I see. And had you not been injured, your regular quitting time would be, on the morning of the 24th, around what time? A. Quitting time, the time would be 6:45.

Q. 6:45. Your ordinary time, exclusive of overtime, would be about eight hours, is that right? A. Yes, sir.

Q. On that particular job there, how many days a week did you work? A. Seven days a week.

Q. Seven days a week. And what had been your average [fol. 11] monthly wages during the year of 1947, say beginning with January, 1947, down until the time you were hurt? A. Approximately $400.00 a month.

Q. How many years had you worked for the railroad company? A. Seven and a half years.

Q. And I believe you have had a complete high school education, have you? A. Yes, sir.

Q. You had some other employment of various kinds before you went to the railroad company? A. Yes, sir, I had.

Q. Now, on that particular morning when you were injured, you were working in connection with a switching crew there, is that right? A. Yes, sir.

Q. And the ordinary switching crew, as was the one you were working with, is composed of five men, is that right?

A. Yes, sir.

Q. An engineer, a fireman, and the switch pin man, and two switchmen, is that correct? A. Yes, sir.

Q. Now, you were one of the switchmen. Who was the other switchman? A. Mr. Tielker.

[fol. 12] Q. And I believe you spell his name T-i-e-l-k-e-r?

A. Yes, sir.

Q. And who was your foreman? A. Richard Millikan.

Q. And you spell his name M-i-l-l-i-k-a-n? A. Yes, sir.

Q. Do you recall the name of the engineer?

A. Scribner—Mr. Scribner.

Q. Scribner? And do you remember the name of the fireman? A. No; I do not recall his name.

Q. You do not. Now, was this a regular engine, just as a matter of information, what you call a steam engine, or was it a Diesel? A. It was a steam engine.

Q. Steam engine. Now, getting down to the location of this accident, it happened in the Fort Wayne yards, is that right? A. Yes, sir.

Q. And that is in the yards of your employer, the Nickel Plate Railroad, it is commonly called, but that is the defendant in this case, the N. Y. C. & St. L. Railroad, is that correct? A. Yes, sir.

Q. The yards there, in a general direction run which way, east and west or north and south?

A. They run east and west.

[fol. 13] Q. And at what end of the yards were you working, at the west end or the east end?

A. The west end of the yards.

Q. And the track on which the injury occurred was what name, or known as what? A. Eastbound main.

Q. Eastbound main. Now, that eastbound main was a long east and west track, is that correct? A. Yes, sir.

Q. I believe Mr. Hocker said in telling the jury that it would hold approximately forty-four cars or some such number, if it were filled from beginning to end between switch points? A. Yes, sir.

Q. At this particular time, just before you got hurt, when you first went in on the eastbound main with any cars at all, do you remember whether the original group of these cars was shoved in or kicked in, your best recollection? A. They were shoved in.

Q. Shoved in. And you were known as, I think, as the field man? A. Yes, sir.

Q. What does the field man, the switchman or the field man, who is the switchman, do, as distinguished from what the head man or switchman does?

A. The field man throws switches and sees that the [fol. 14] tracks are tied down with an Ajax brake.

Q. And what does the head man do?

A. The head man holds pins and opens knuckles, and cuts the cars off.

Q. Aside from the difference in the type of work is location, the head man works only at the head end, that is the engine man, and the field man is any place out in the field, is that right? A. Yes, sir.

Q. As you went in with these cars that were shoved in originally on the eastbound main and shoved them down as far as they were thought to be desired, do you remember how many cars were in that original group that were shoved down there? A. No.

Q. Approximately? A. Approximately six or seven.

Q. Six or seven. Now, what, if anything, did you do with that original group with reference to putting on an Ajax brake, tying the track down or those cars down, did you put on such a brake? A. Yes, I had an Ajax brake.

Q. And do you remember whether you put it on the east end car, that would be the easternmost car, or the one next to it, or just where it was?

[fol. 15] A. No, I don't recall just where it was, but it was toward the east end of the track, that track down there.

Q. All right. Now, after that particular group of cars was shoved down there and were located, and placed, and

tied down at the east end of the place, where you were going to work with other movements subsequent to that time, you were going to put other cars in on the eastbound main west of that group, is that right? A. That is right.

Q. You were not confined, however, to the cars that were coming into the eastbound main, the other tracks received cars, too, did they? A. Yes, 11, 10, 9, and 8.

Q. Now, I believe, just as a matter of location there, that we considered these tracks running east and west, and the eastbound main is north of No. 11, isn't it?

A. Yes, sir.

Q. In fact, the next track that is south of the eastbound main is No. 11, is that right? A. Yes.

Q. Going from north to south. The next track south of 11 is 10, then 9, then 8, and then 7; is that correct?

A. Yes, sir.

Q. Now, just before you were hurt, what was the last [fol. 16] track that you had been in on, in doing any job there, what had you done?

A. I rode a car in toward the 7 track and put a brake on that car.

Q. That means a car had been kicked loose from the engine, went in on track 7, and it was your job to ride it down, and you did ride it down and tie the brake, did you?

Mr. Hocker: I object to the leading and suggestive form of the question, your Honor.

Mr. Eagleton: That is, I think, correct. I will reframe the question.

Q. Did this car, or had this car that you had ridden down on 7, had it been kicked by the engine down on track 7?

A. Yes, it had. That had been kicked, which made it necessary to ride it.

Q. All right. You then did ride it down? A. Yes.

Q. You did put a brake on it? A. Yes.

Q. And after you put a brake on that car on track 7, what did you do next?

A. I noticed the separation on the main.

Q. Noticed the separation on the main, and what was your duty when noticing the separation, what was it your duty to do?

A. To stop these cars from running down the main.

Q. Now, which way did the main decline, as far as direc- [fol. 17] tion is concerned, was it a slope from the west to the east, downhill?

A. The slope is from the west to the east, downhill.

Q. And when the cars were running away, about at that time how much space was there between the cars by the time you noticed the separation?

A. I would say it was approximately two car lengths' separation.

The Court: How many?

Mr. Eagleton: Two car lengths. Is that correct?

The Witness: Yes.

Q. And when you noticed this separation, which group was rolling away, the group that the engine had hold of to the west, or the eastern group that the engine did not have hold of?

A. The eastern group that the engine did not have hold of.

Q. And what did you do when you saw that there was such a separation?

A. I ran over and attempted to stop these other cars.

Q. And what would you do, if you got over there successfully, what would you do to stop them?

A. You would apply a brake when you got there.

Q. Would you have to climb, or how would you do it?

A. You have to climb a ladder and put a brake on.

Q. You would have to climb a ladder and get up somewhere on top, depending on which kind of brake it was, [fol. 18] and put a brake on and stop it from rolling, is that it? A. Yes, sir.

Q. Now tell us what you did do when you ran over there, how far you got, and what happened to you when you got over there.

A. Well, when running over there, when I approached one of the cars, I was approximately two feet away from the car when my foot stepped on an object that rolled and threw me towards the cars. I made an attempt to grab the ladder, but my hand slipped out, I fell underneath the car, my leg was taken off.

Q. Now, at the time that you were running over there to stop, for the purpose of stopping these cars, how fast would you say they were rolling there in your judgment?

A. In my judgment, I would say approximately five miles an hour.

The Court: What did you say?

Mr. Eagleton: Five miles.

The Witness: Five miles.

Q. Now, do you remember what car, at the end of the car, assuming that the cars were rolling away, that the cars would be at the west end, having in mind that west car on the west end of the group that were rolling away to the east, where did you fall or get run over, with reference to that car?

A. With reference to that car, it was the east end of the car, the south side.

Q. The east end of the car, on the south side.

[fol. 19] Now, may we at this point agree on the numbers of those two cars?

Mr. Hocker: Oh, sure.

Mr. Eagleton: I mean taken in rotation. It may be agreed, as a matter of saving some time, your Honor, with reference to the numbers of the particular cars—is this in here? I see one here.

The Court: Did I understand you to say it was the east end of the east car of that movement that ran over you?

The Witness: It was the east end of the south side of the car.

The Court: Of the east car?

Mr. Eagleton: No, the west car, your Honor, the west end.

The Court: The west car. You fell between two cars?

The Witness: Yes, sir.

Mr. Eagleton: It may be agreed, for the purposes of the record, and I think it will save us a great deal of time and the introduction of some exhibits, it was between the west

end of Rock Island car No. 156067, which is the car that ran over him, and it was at the west end of that group of cars rolling away to the east and the east end of a Pennsylvania hopper car numbered 727512, that is the place where the separation occurred as between those two [fol. 20] cars, between the east end of the Pennsylvania car, hopper car we will call it, and the west end of the Rock Island car, the box car.

Mr. Hocker: That is correct.

Q. And it was the box car numbered 156067 that ran over you. Is that the car you were trying to get on?

A. Yes, sir.

Q. I believe Mr. Hocker said that next to it but farther east there was a Norfolk & Western car, but you would not know yourself anything about what was next east, would you?

A. No, I wouldn't know what type of car it was.

Q. I see. Well, at any rate, when you were run over, what was the first thing that you saw, where were you lying when anyone came to you, where were you with reference to the tracks numbered—the eastbound main and No. 11, do you know where you were lying?

A. I was lying approximately, I would say approximately two car lengths from 14, side track switch, and 14 track switch is on the westbound.

Q. Well, when the plat gets here, we will have that a little more accurate. You can point it out to him, you know more about that plat than I do, and I think that will suffice; but what I was trying to get at was not so much where you were with reference to switch 11, but how far out from the rail, the south rail of that eastbound main [fol. 21] when you got loose and your leg was run over. Do you remember whether you were lying two feet, three feet, or four feet out, or do you recall?

A. I know I was lying right, it was approximately in the middle of the track, about a foot and a half or two foot from the cars.

Q. I mean after the car ran over you.

A. After the car ran over my right leg, I kicked out with my left leg, I skinned the shin, my knee, my leg from the knee on down, and I kicked out in order to save this leg, in order to get out from under the cars.

Q. And when you say you were approximately in the middle, you mean you were approximately between the eastbound main and the track next south of it, No. 11?

A. Yes.

Q. I see. About what space was there between those tracks? Do you know whether that shows on the plat?

Mr. Hocker: Yes.

Q. About, tell me, about eight or nine, ordinary distance, eight or nine feet between tracks? A. I don't know.

Q. Some such distance anyway, is that right?

A. Yes, sir.

Q. All right. That is okay. Who was the first person that came to you, do you recall?

[fol. 22] A. Dan Eicher was the first person that came to me.

Q. Dan Eicher? A. Yes, sir.

Q. And he was an employee of the railroad company?

A. Yes.

Q. And then I believe some other gentleman came and helped tie up your leg? A. Rudy—a Mr. Faulks.

Q. Faulks? A. Yes.

Q. And he made a tourniquet, I believe you call it?

A. Yes. Took my belt off, tied it on and stopped the flow.

Q. Could you see to what extent your leg had been damaged at that time?

A. Yes. When I kicked out from under the cars, I looked down, I noticed it, that the muscles and that was all just sticking out in a mass, and then I called for help. It was just hanging on, the leg was lying underneath, one leg was lying underneath the other one.

Q. All right, let me ask you this: this accident happened in the night time, didn't it? A. Yes.

Q. And you were using a lantern, I suppose, for the pur-

[fol. 23] pose of giving signals, isn't that true? A. Yes, sir.

Q. And I guess you carried that lantern with you when you ran over there to tie down these cars?

A. Yes, sir, I did.

Q. What was the condition—something was said that there were flood lights in the yard—what was the condition as to whether it was light or dark around there?

A. Well, it was not—it was not real dark and it was not

real light. A lot of times the smoke from the engine will blow across, mix, you know, with the lights and flood lights in the yard, make it a little darker, and sometimes it is all right; it is all where the engine is located.

Q. Well, on this night, as you went across, do you recall whether it was raining? A. It wasn't raining that night, no.

Q. Well, do you recall whether there was steam from the engine and things of that kind making it darker, or can you tell us about that? A. Yes, there was.

Q. Now, you were taken from the place where this injury occurred to St. Joseph's Hospital, was it, in Fort Wayne? A. Yes, sir.

Q. And you were attended there by doctors provided, as Mr. Hocker says, by the railroad company?

[fol. 24] A. Yes, sir.

Q. And one doctor, I believe, was Doctor Berghoff, you spell that B-e-r-g-h-o-f-f, and the other was Doctor Stauffer —S-t-a-u-f-f-e-r, is that correct? A. Yes, that is correct.

Q. How long did you remain in the hospital when you went in?

A. You mean before they took me up to the operating room?

Q. Oh, no, no. I suppose they gave you rather immediate attention and performed surgery, and kept you up there to do that job and amputate the rest of the leg that was necessary, is that right? A. That is right.

Q. That was the right leg? A. Yes.

Q. And what I meant was how many days did you continuously remain in the hospital before you came home?

A. I was altogether one hundred twenty days in the hospital.

Q. That would bring you—one hundred twenty days would be four months—that would bring you up to some time in January? A. Yes.

Q. I believe you told me some time ago that a few days before Christmas they let you come home and you went?

A. Yes; they let me come home a few days before Christmas.

Q. And how long was it after you got back then, was [fol. 25] it that your leg continued to drain and remain open? A. Until around in April.

Q. Some time in April? A. Some time in April.

Q. And what is the condition of your leg now?

A. The condition of my leg right now is that it—that it—there is a constant weight moving in there, just all in here it feels like I am sitting on the back of my heel; and at night time, try to sleep, I wake up and cry at times; I take aspirins, and then I have books I read when trying to get to sleep. If I take aspirin, I have reactions in a couple of toes, it is a constant movement all the time of the toes and that heel, and that bone, and that bone is pushing right against there, just like the socket of that bone, the bone seems like it wants to push right out through that skin, it just seems like it is a constant pushing, it works on your nerves all the time.

Q. And when you use that wording, do you mean those conditions you speak of here with reference to your nerves, and the actions that you have experienced, reactions or reflex actions, whatever they are, are present all the time, night and day? A. Yes, all of the time, night and day.

Q. Do they get worse at night, day, or when?

A. At night time they get much worse. They seem like when I go to lie down to sleep, then relax, that kicks, [fol. 26] kicks up in the air, seems like just when I am going to sleep that kicks up in the air, then I have to sit up, and I can not rest. Keeps on your nerves all the time.

Q. Have you got your trousers leg in such shape there you can show us that stump, please? A. Yes.

Q. Incidentally, how much stump is there by measurement, I believe from the fold where it joins there near the crotch down to the longest part of the stump, do you recall? A. There is four inches.

Q. Four inches?

The Court: Four inches is the length of the stump. What was the last question?

Mr. Eagleton: How much stump remains.

The Court: I mean before that.

Mr. Eagleton: About the stump, if he could show us the stump of the leg.

The Court: I don't think that is necessary.

Mr. Eagleton: All right, your Honor.

Q. Is this stump that remains there—can you tell from looking at it with the naked eye about how it looks, give me an idea whether it is red, how it is, tell us about that, if you will.

A. Well, right where the bone is feels like it is pushing through the skin, it is all inflamed around there, just that [fol. 27] bone, it is—the skin is all inflamed, and from having it taped up and bandaged up all this time, the tape has tore the skin, the skin gets blistered under the tape, and it causes—and when I pull the tape off, I just pull the skin right along with that tape and then there are two sections that look like two fists come like this (indicating), that has about that much separation, where the skin is not knitting together. That is all right alongside of this bone that is pushing against the skin.

Q. I assume that prior to the accident we are speaking about, you had good possession of your faculties, legs and arms, including this particular leg, is that right?

A. Yes, I did.

Q. When you say that you have—your sleep and rest is disturbed nights, that you have to take aspirins, that you have crying spells, and so forth, how often does that occur, how many nights a week?

A. That occurs every night. It is a common occurrence every night.

Q. These cars that were put in on the eastbound main, including the ones that separated, that we have numbered and described here, had you done anything with reference to putting them in on the eastbound main, either kicking them in or riding them in, or doing anything with refer- [fol. 28] ence to the cars that were put in on the eastbound main, other than the first group that you tied an Ajax brake down when they shoved in originally?

A. No, I didn't have anything to do with the cars that were kicked down.

Q. Who was looking after that end of the work?

A. The pin man and the conductor.

Q. And the conductor. That is Millikan and Tielker?

A. Yes.

Mr. Eagleton: I believe that is all.

Cross-Examination

By Mr. Hocker:

Q. Mr. Affolder, Mr. Eagleton said you had had some other employment prior to coming to the railroad. What type of other employment have you done?

A. I worked at the Freese Tool & Machine Works, and the General Electric, as machinist, and at the Perfection Biscuit Company.

Q. What type of work was that at the Freese Tool & Machine Works? A. That was machinist work.

Q. And the Perfection what company?

A. Perfection Biscuit Company.

Q. What type work did you do there?

A. I dumped bread, put on racks; dumped bread, put them on racks; worked some in the roll and cake department.

Q. Was that the first job you had, may I ask?

[fol. 29] A. Yes, that was.

Q. Just out of high school when you took that job?

A. No. It is while I was going to high school.

Q. Oh, I see. Well, I am talking now about full-time employment. You had had work at the Freese Tool Machinery Company after leaving high school, had you?

A. Yes.

Q. Then you mentioned some other company.

A. General Electric.

Q. What type of work did you do for General Electric?

A. Machinist.

Q. Had you had any vocational training in the work as a machinist, in high school?

A. Yes. In my last two years of high school, I went to Central High School then and took the cooperative course.

Q. What does that mean?

A. It means you study in machinist work, you study different types of machines, and how to operate them, how to read blue-prints.

Q. And you graduated from that course, did you?

A. Yes, I graduated from that course.

Q. And then you had some apprenticeship, I suppose, and then went off a journeyman machinist?

A. No. Apprenticeship.

[fol. 30] Q. How long did you work for the Freese Tool &

Machine Company and General Electric as machinist, altogether? A. Oh, I would say approximately five years.

Q. Did you learn to do layout work, to read blueprints, and that sort of thing?

A. No. It was most generally setup prints, I would be able to read a blueprint, have a milling print projecting machine, set up by my foreman.

Q. Then you went to work for the railroad? A. Yes.

Q. Did you ever have any other employment? I am speaking now—I am not talking about temporary jobs or anything of that sort, but I mean employment of any consequence?

A. Well, I was at the Harvester—International Harvester—I worked there, too, during the depression, right after the depression.

Q. What type of work did you do?

A. The same type of work I had at G. E. and Freese Machine & Tool Works.

Q. But you were never in the service, I believe?

A. No, I was not.

Q. Was that because of any physical disability?

A. No, that was not.

[fol. 31] Q. Your home is in Fort Wayne? A. Yes, sir.

Q. You have lived there all your life? A. Yes, sir.

Q. I believe your mother and father live there?

A. Yes, they do.

Q. And, of course, your family, your wife and children live there? A. Yes, sir.

Q. And this accident happened there? A. Yes, sir.

Q. All the witnesses, so far as you know, that knew anything about your injury, live in Fort Wayne? A. Yes.

Q. All the records that had anything to do with the case are kept in Fort Wayne, as far as you know?

A. As far as I know.

Q. The doctors that treated you and the hospital where you were treated were all in Fort Wayne?

A. Yes, they were.

Q. There is no witness here in St. Louis that you know of, outside of those brought here for the trial?

A. None that I know of.

Q. Did I understand you to say, Mr. Affolder, that you did not know what type of car was the second one from the separation in the east half of the cut?

A. I could not tell you the initials of the car or the [fol. 32] number of the car. I did not notice that, is what I say—I knew it was a hopper, not to tell you the initials or the number of the car.

Q. Well, you were actually trying to climb onto the second car, weren't you?

A. No, I was not. I was trying to board the first car.

Q. You mean the Rock Island car?

A. Yes, the Rock Island box car.

The Court: I failed to catch it. How many cars were in separation?

Mr. Hocker: Well, there were—

The Court: Did you testify to that?

Mr. Hocker: We can agree to that, Judge.

The Court: On that, he did not testify. I thought that he had.

Mr. Hocker: We can agree. I think there were twenty-nine altogether, and there were four cars west of the separation, and that would make it twenty-five cars east of the separation.

The Court: That were moving?

Mr. Eagleton: That is right. Twenty-five cars moving, and the separation occurred between the west end of the twenty-fifth car and the east end of the twenty-sixth car. That is our understanding.

[fol. 33] Mr. Hocker: That would be right.

Q. At least you were trying to board the last car in the cut? A. The west car.

Q. What kind of a brake did that car have?

A. That, I do not recall.

Q. Were you attempting to reach an Ajax brake, did you say?

A. No, I did not say I was attempting to reach an Ajax brake.

Q. According to my recollection, you said—Mr. Eagleton said, was it your duty and did you attempt to stop the car, and you said you were—it was your duty to set an Ajax brake, or did I understand you?

Mr. Eagleton: That was the original group of cars, he said.

A. That was the original group that was first set down the main. There was an Ajax brake set on that original group that we shoved over from the other side of the yards.

Q. Do you remember what kind of brake this hopper car—

Let's agree it is a Norfolk & Western car.

Mr. Eagleton: It was next east of the Rock Island car.

Mr. Hocker: Of the Rock Island, that is right. We will agree that is a Norfolk & Western hopper car.

Q. Do you remember what kind of brake that had, was equipped with?

A. I am pretty sure that was equipped with an Ajax brake.

[fol. 34] Q. And what kind of a brake was the Rock Island car equipped with?

Mr. Eagleton: He said he did not know.

A. As I said before, I do not recall what type of brake that box car had.

Q. Do you remember when Mr. Eagleton arranged to take the depositions of Mr. Tielker and Mr. Millikan in Fort Wayne last April? A. Yes, sir.

Q. And in which I took your depositions the same day?

A. Yes, sir.

Mr. Hocker: Calling attention to page 22 of the depositions, Mr. Eagleton, that is where the changes were made.

Mr. Eagleton: Yes.

Q. Do you remember that I asked you these questions, and you gave me—and whether or not you gave me these answers at the time the deposition was taken:

"Now, then, on this occasion, which car from the end of the separation were you attempting to board in order to set the brakes?

"A. Which car?

"Q. Yes, do you remember?

"A. The east end, second car."

That is what the reporter has written here, and I see stricken out and written in handwriting:

"first car.—F. G. A."

[fol. 35] Do you remember what answer you gave there?

A. I did say the second car, but it takes two cars there to make your separation, the one west and the one east, and that would be the second car, according to that.

Q. Do you mean you, as you read this over and corrected it, you think the reporter got your answer correctly, but that I misunderstood what you meant by your answers; is that right? A. That is right, Mr. Hocker.

Q. And that is why you made the changes in here?

A. That is right.

Q. So that the answer would be:

"East end, second car."

And you struck that out and wrote: "first"?

A. Yes.

Q. And the next question:

"The east end of the second car?"

"A. Yes, box car."

And you wrote in:

"No, first car box car."

Which end was the brake end of the box car, do you recall that?

A. The brake end of the box car was on the east end.

Q. Now, Mr. Affolder, when you saw these cars—well, let me ask you this: did you notice how far that string of [fol. 36] cars moved after you were injured?

A. No. That is one thing I couldn't tell you, how far they actually moved after I was injured.

Q. Well, some of the witnesses have testified that the total separation was about four cars when they came to a stop?

Mr. Eagleton: Four or five, they said between four and five cars.

Q. All right, between four and five, that is good enough for me. Does that sound about right to you, as you recall it? A. Yes, that does.

Q. About four or five? A. About four or five.

Q. And when you saw it, you say it was about two cars probably when you saw it down at 7 track, is that it?

A. I said about two—two cars, approximately two or two and a half cars, it would be hard to judge exact.

Q. So the cut then moved two or two and a half cars more between the time you saw it and when it finally came to a stop? A. Yes.

Q. And, of course, you did not get the brake set, did you? A. No, I did not.

Q. Now, that eastbound main will hold about forty-four cars, will it? A. Yes.

[fol. 37] Q. And that would mean there was space for about fifteen cars more at the other end of the track, is that it?

A. Yes, that would mean that if you, yourself, knew how many cars was actually on the main, but when you are riding the cars in on tracks, you can't go over and keep track of the amount of cars they put on the main, there is no way of you knowing that yourself.

Q. That is right. There were only two—you call them helpers or switchmen, which do you call them, that job you were doing?

A. They are referred to as back of the engine yard helpers and switchmen.

Q. That is, you and Tielker were the only switchmen in the group, is that right? A. Yes, sir.

Q. And you were the field man working away from the engine, is that right? A. Yes, sir.

Q. Now, Mr. Eagleton asked you and you testified that it was your duty, or you conceived it to be your duty, to leave—you were perfectly safe over where you were in the No. 7 track's switch, is that so, you were not in any danger there? A. No, I was not.

Q. And you said it was, as I understood it, your duty, or you thought it was your duty to leave that place of [fol. 38] safety and run over to the moving cars, is that right?

A. Yes, naturally. It would be your field man's duty.

Q. Were you running as you went between the tracks, over the tracks?

A. Well, I had my clothes on, my coat on, my heavy clothes, I was hurrying.

Q. Now, of course, in your seven—seven and a half years with the Nickel Plate, you are familiar with the rule book and the rules and the rules for the—governing the operating department, aren't you, Mr. Affolder?

A. Yes, I am.

Q. And you are familiar that the very first statement in the rule book is that safety is of the first importance in the discharge of duty. You are familiar with that, are you not? A. Yes, I am.

Q. And you are familiar with the small green book of safety rules, are you not? A. Yes, sir.

Q. And do you recall that the first statement in that rule book is safety is of the first importance in the discharge of duty, do you recall that? A. Yes, I do.

Q. Do you recall that the third statement in there is, a railroad does not expect its employees to incur any risks [fol. 39] from which they can protect themselves by the exercise of their own personal care and judgment, do you recall that? A. Yes.

Q. Are you familiar with rule 101, with train and engine service rules, particularly to one that says employees are forbidden to get on or off cars or locomotives moving at too great a speed for safety, are you familiar with that rule? A. Yes, I am.

Mr. Hocker: I believe that is all.

Redirect Examination

By Mr. Eagleton:

Q. Mr. Affolder, I just wanted to ask you one question. Have you been instructed in breaking in in your railroad work and in doing it by your various foremen and superiors from time to time, that in the event cars do roll away, of that kind now, what your duty is?

Mr. Hocker: Just a minute now. I object to the leading and suggestive form of the question.

Mr. Eagleton: I have not made any suggestion. Has he been instructed as to what his duty is under those circumstances.

The Court: I will let him answer.

Mr. Eagleton: You may answer.

A. I have been instructed—

[fol. 40] Mr. Hocker: (Interrupting) Wait a minute. Excuse me, your Honor That is not responsive to the question, what he was instructed.

The Court: The question is, have you been instructed?

Mr. Eagleton: The question is, have you been instructed? You can answer that yes or no.

A. Yes, I have been instructed.

Q. And by whom have you been instructed in that regard? A. By any number of older conductors over there.

Q. And what were the instructions with reference to—

Mr. Hocker: (Interrupting) Just a minute. You may complete the question, then let me make my objection.

Mr. Eagleton: Wait until he has a chance to object, if you will, before you try to answer, if you know he is going to object.

Q. What were the instructions you received from your superiors with reference to a situation of this kind, where cars are rolling away in a Fort Wayne yard to the east, as to what you should do under those circumstances?

Mr. Hocker: Your Honor please, I will object to that as calling for hearsay.

The Court: Overruled.

Mr. Eagleton: You may answer.

A. You are instructed that any cars or number of cars [fol. 41] that are rolling down at the other end of the yard, you should stop them.

Mr. Hocker: That is not responsive to the question, your Honor. He says, "You are instructed." The question is, who instructed him, and on what occasion, and what did that instruction consist of.

The Court: You understand the question is what your instructions were.

Mr. Hocker: To you.

The Witness: My instructions were to apply brakes on any cars that were running away down at the other end of the yard.

Q. Who, for instance, what conductors or superior officers have told you that over a period of seven years before this accident?

A. Mr. Laduke, Mr. Drennan, Mr. Roman—any number of them I could name.

(The spelling of the three foregoing names is phonetic and was not supplied by the witness.)

Q. That is the way, aside from instructions, that is something you did customarily and regularly whenever that condition arose? A. Yes.

Mr. Eagleton: That is all, Mr. Affolder.

[fol. 42] Questions by the Court.

Q. I am a little confused about those twenty-four cars that were moved. You said you got on—was going to get on the Rock Island car. Was that on the east end of the movement or the west end of the movement?

A. That was on the west end of the movement.

Q. The last of the twenty-four cars?

Mr. Eagleton: Twenty-five cars.

Q. Was it twenty-five cars?

A. It was the first car of the twenty-five cars that was moving down.

Q. You mean the first car on the west end?

A. The first car on the west end.

The Court: All right.

Further Redirect Examination.

By Mr. Eagleton:

Q. And they were rolling from the east, so that his Honor is right, putting it the other way, in that group of twenty-five cars rolling to the east, it was the last of the twenty-five cars, beginning at the east end?

A. Beginning at the east end.

Q. But the first car beginning at the west end?

A. The first car beginning at the west end.

Q. Of the east end of that separation, is that right?

A. Yes.

[fol. 43] Q. The other part of that separation remained west of that point with the engine, is that correct?

A. Yes, that is correct.

Mr. Eagleton: All right. That is all.

The Court: All through with this witness?

Mr. Hocker: Yes, your Honor.

Mr. Eagleton: You may step down.

The Court: You are excused.

[fol. 44] Mr. Eagleton: Mr. Tielker, come around, please.

ELMER H. TIELKER,

a witness of lawful age, being duly produced, sworn, and examined, testified on behalf of the plaintiff, as follows:

Direct Examination.

By Mr. Eagleton:

Q. What is your name, please, sir? A. Elmer H. Tielker.

Q. How old a man are you? A. Thirty years.

The Court: How do you spell your name?

The Witness: T-i-e-l-k-e-r.

Q. And where do you live, Mr. Tielker?

A. 1806 Bueter Road, Fort Wayne, Indiana.

Q. How do you spell that street? A. B-u-e-t-e-r.

Q. Bueter. You are at present in the employ of the defendant, the Nickel Plate Railroad, are you? A. Yes, sir.

Q. And you have been brought here by the defendant to this trial? A. Yes, sir.

Q. How long have you been in the employ of the defendant? A. Well, I hired out in January, 1941.

Q. And you are working there continuously since that time?

[fol. 45] A. Except for about twenty-six or twenty-seven months in the army.

Q. Now, Mr. Tielker, on the day this accident occurred, on September 24, 1947, I believe it is said you were a

member of the switching crew in which Affolder was employed; is that right? A. Yes, sir.

Q. And that Millikan was the foreman, and then two others, an engineer and a fireman, is that right?

A. Yes, sir.

Q. You were the head man, so to speak, the head man working at the head end of the train, and he was the field man? A. That is right.

Q. And although you may have been called switchman, I believe you are sometimes called yard helpers?

A. That is right.

Q. And the foreman is called yard foreman or conductor, is that right? A. Yes, sir.

Q. Now, at the time of this injury—I want to deal particularly with the eastbound main. The eastbound main is an east and west track in the Fort Wayne yards of the defendant, is that correct? A. That is correct.

Q. I believe it was said that originally when you went [fol. 46] in on that track and they shoved some six or eight cars down to the east end, that was the first movement in there was shoved in, isn't that right?

A. It was shoved in, but not down to the east end.

Q. Not down to the complete end of the track, down towards the east end? A. That is right.

Q. The distinction being that the track will hold perhaps forty-four cars, and the shove movement ended short of that some fourteen or fifteen cars, is that right?

A. Well, the ordinary run of cars would be that, approximately forty-four or forty-five cars.

Q. I see. Now, Affolder is the one that tied down the brake down at the east end, is that correct? A. Yes, sir.

Q. And after the first group of cars were in there on the eastbound main and tied down, then you began kicking cars into the eastbound main and to other tracks, did you?

Mr. Hocker: Excuse me. I will object to the leading and suggestive form of the question, your Honor.

Mr. Eagleton: Oh, I think that is, if your Honor please. I am willing the change the form of the question.

The Witness: You mean—

Q. I will withdraw that question, sir. After the first [fol. 47] group of cars were in the eastbound main, what

work was done thereafter with reference to the eastbound main, putting cars in there, what was done?

A. It seems to me we made the second shove movement, and then we proceeded to switch cars into the various tracks.

Q. All right. Well, now then, were you—what part did you play or have to do with putting the cars in there that went in subsequently on the eastbound main?

A. Pulled the pins on the cars.

Q. And what devices are you furnished with on the cars for the purpose of pulling the pins, lifting the pins?

A. A lift lever.

Q. A lift lever?

A. There are various—there is the push type and the underslung, and then one that raises the pin up.

Q. In other words, there were various types of couplers, various types of lift levers, but the general purpose of all is to either pull a pin up or drop it down so that the knuckle will open or close, depending on what you are trying to do, close a knuckle or open a knuckle, is that right? A. That is right.

Q. And the knuckle, we speak of the knuckle, the knuckle is part of the coupling device? A. That is true.

[fol. 48] Q. And would you say the pin that drops down is part of the coupling device? A. That is right.

Q. In fact, it is the pin that does the locking after the knuckles come together or engage, is that right?

A. Yes, sir.

Q. We have agreed here, Mr. Tielker, so we can shorten the time, that the separation occurred on the eastbound main just before the plaintiff was injured, between the west end of the twenty-fifth car on the eastbound main, known as the Rock Island box car, and the east end of the twenty-sixth car, which was west of it, known as the Pennsylvania hopper car. Now, do you have those—for the purpose of my question, do you have those cars in mind then? A. Yes, sir.

Q. When that Rock Island box car was sent down on that track, who—on whose direction and signal was it sent down? A. On mine, sir.

Q. And when it was sent down on the eastbound main, did it make by impact, couple onto the cars that had preceded it there? A. It should have.

Q. Well, did it? I mean from what you found out later?

A. Yes, sir.

Q. Now, was it kicked hard enough for to do it?

[fol. 49] A. Yes, sir.

Q. And when the—did that go down as a single unit, do you recall, that Rock Island car, or with a group?

A. I believe that went down singly. I am not so sure.

Q. When it went down for the purpose of joining the twenty-four cars ahead of it on that track, can you tell us whether the knuckle at the west end of that Rock Island car, as you sent it down, was open or closed?

A. I don't know.

Q. On that Rock Island car? A. That is right.

Q. Now, with reference to the next car that was going down to join the Rock Island car, that would be the twenty-sixth car, or the Pennsylvania hopper car at its east end, did you have any duty to perform with reference to the knuckle on the east end of the Pennsylvania hopper car? A. Yes, sir.

Mr. Hocker: Well, wait a minute. I object to that as irrelevant, your Honor, whether he has any duty to perform. The question is what he did.

Mr. Eagleton: Well, I am just—

Mr. Hocker: Might ask him for details of what was done, if you want to.

Mr. Eagleton: Well, I am coming to that.

[fol. 50] The Court: That, I suppose, is preliminary.

Mr. Eagleton: That is right.

The Court: Overruled.

Q. What did you do with reference to the knuckle at the east end of that Pennsylvania hopper car, the twenty-sixth car? A. I opened it, sir.

Q. You opened it? A. Yes, sir.

Q. And what did you do in order to open it, and what did you have to do?

A. I had to pull the lift lever up, and it took about two or three pulls in order to get it up so I could open the knuckle, the pin.

Q. At what side of the car were you standing when you were using the lift lever on that particular car at that time, that is, the twenty-sixth car, just before it went down the track? A. The southeast corner.

Q. The southeast corner. And when you say it took two or three tries to get it to open, was there any reason that you discovered why it would take two or three tries to open it, or did take them?

A. I noticed the lever bracket, that is the piece that holds the lever, that it was bent in. It looked as though it might have been—

[fol. 51] Mr. Hocker: (Interrupting) Well, I will object to the comment, your Honor, what might have been.

The Court: Sustained.

Q. Well, tell us what it looked like, in other words to you, and you can tell. A. It was bent under.

Q. And what effect, if any, was the bending under of that lever, operating lever bracket, having, if you can tell, with reference to the operating lever?

A. Well, it made it a little difficult in opening it up.

Q. Made it difficult to open?

A. To my estimation, yes, sir.

The Court: Made what difficult to open?

The Witness: This bracket being bent made it difficult for the lever to pull up so that the knuckle would open.

Q. Now, when you kicked that car down, the Pennsylvania hopper car—and you say you did get the knuckle on the east end open? A. Yes, sir.

Q. If you have one knuckle open, and a coupling is sought to be made by impact, that is all you need, is one open knuckle, is it? A. It should be, yes, sir.

Q. And just as a matter of information, if there are two closed knuckles, there will not be an automatic impact, [fol. 52] will there, or a coupling by impact? A. No.

Q. But if you have two open knuckles, there will?

A. Yes, sir.

Q. Or if you have one open knuckle and one closed knuckle, there will be or should be an automatic impact coupling, is that right?

Mr. Hocker: Just a minute. I will object to the leading and suggestive form of the question, your Honor.

Mr. Eagleton: Well, that is what you said here in your opening statement, Mr. Hocker; I was merely going into the statement you made.

Mr. Hocker: I move to strike that. Better let the witness testify.

The Court: Sustained.

Q. What is the fact—I will put it that way—with one open knuckle and one closed knuckle, will that make an impact coupling, coming together by shoving them down?

A. The couplers should make.

Q. Should make and come together? A. Yes, sir.

Q. Did you kick this Pennsylvania hopper car down hard enough to have it join onto the cars ahead?

A. It should have; yes.

[fol. 53] Q. You kicked it down? A. Yes, sir.

Q. For that purpose, and kicked it hard enough, did you? A. Yes, sir.

Q. When you found after the accident that this separation had occurred, it occurred between the east end of that separated Pennsylvania hopper car and the west end of the Rock Island car, did it not? A. Yes, sir.

Q. Approximately how far were the cars separated, your best judgment, after the plaintiff was hurt?

A. Somewhere between four and five car lengths.

Q. And can you tell us approximately where the plaintiff Affolder was lying between—the total distance of the separation, assuming it was four or five cars, where was the separation that was east of him, how far east, and where was the separation that was west of him, and how far west?

A. Well, as near as I can estimate, he must have been a good—about three car lengths east of the hopper car.

Q. Three car lengths east of the—

A. (Interrupting) Approximately two cars west of the—

Q. Of the Rock Island?

A. Of the Rock Island, that is right.

Q. And he was lying you indicated, I believe, south of [fol. 54] the south rail of the 3 track?

A. I don't know how he was lying, sir.

Q. From your experience as a brakeman and switchman, have you had experience with cars of that type that have bent operating lever brackets and matters of that kind before? A. Oh, you see them every once in a while.

Q. And with one such as this one, say that was bent and causing difficulty in opening that particular device, would that or not have any effect on the dropping the pin when that car went down there, would that cause the pin to drop or not to drop on coupling?

Mr. Hocker: I object, your Honor, for lack of qualification of this witness to express an opinion on that subject.

Q. Based on your experience.

The Court: Overruled.

A. Well, it should make, as far as I know.

Q. What did you say? A. I believe it would make.

Q. You believe what would make?

The Court: What?

A. May I have the question over?

The Court: I don't get that. Do you say would make?

Mr. Eagleton: The reporter could read that question. [fol. 55] Will you read that question for him, please, Mr. Buchanan?

The Court: I believe you better ask the question again.

Mr. Eagleton: Yes.

Q. What I wanted to get at, Mr. Tielker, would a bent operating lever bracket which caused you to have difficulty in opening the knuckle and getting the pin out, would that have any effect, in your judgment and from your experience, when that went down, that is the bent operating lever, would it cause any difficulty in having the pin drop and closing it?

Mr. Hocker: Just a minute, Mr. Tielker. I will object to that question, your Honor, first, on the ground of the lack of the witness's qualification—and I understand your Honor to have ruled on that, but, secondly, on the ground that it hypothesizes a bent operating lever, and there was no evidence about that.

Mr. Eagleton: Bracket—bent operating lever bracket.

The Court: With that change, answer that question.

Mr. Eagleton: You may answer the question.
A. It might have.

Mr. Eagleton: I believe that is all.

Cross-Examination

By Mr. Hocker:

Q. Mr. Tielker, I understood you to say that when the Rock Island car was kicked in, you don't know whether [fol. 56] the knuckle on the west end was open or closed?

A. Well, it was, when it left me it was open, but impact could have closed it.

Q. So that you do not know and you can not say whether, after the Rock Island car came in contact with the other string of cars in on the eastbound main, whether the knuckle was then open or not?

A. No, sir; I couldn't say.

Q. And it was for this reason that you opened the knuckle on the west end or east end of the Pennsylvania hopper car? A Yes, sir.

Q. Because, of course, if the Rock Island knuckle was closed and the knuckle on the Pennsylvania was also closed, no amount of impact would cause the couplers to operate, would it? A. That is right.

Q. Now, then, did you inspect the coupler of either car before that accident?

A. I walked down as far as the hopper car, the east end of the hopper car; that is as far as I went. I did not go down to the action.

Q. You can not testify then as to the condition of either knuckle after the accident occurred? A. No, sir.

[fol. 57] Q. You did not have anything to do with getting Affolder to the hospital following the accident, did you?

A. No, sir.

Q. You went in, I think, and was it you that went in and reported the accident, or was it Millikan?

A. No, sir. Mr. Millikan reported the accident.

Q. Of course—did you stop work at that time when the accident happened?

A. Yes, sir. When I found out—when I seen Dick run-

ning across to report the accident, I didn't know it. He come out of the yard office, and I got from him that there was an accident; in other words, our last movement was a shove movement; then we made the cut and pulled up west, and that is as far as we got.

Q. In other words, you were working on the north side of the cars, is that it? A. That is right, yes, sir.

Q. And the accident happened on the south side of the cars, is that right? A. Yes, sir.

Q. And you did not see the accident happen? A. No, sir.

Q. And did not know that it had happened until you had pulled these cars nor until the engine pulled out, is [fol. 58] that it? A. That is right.

Q. Now, when you found out that an accident had happened, what did the crew do? A. We just sat still.

Q. You left the engine where it was? A. That is right.

Q. Did you go to lunch?

A. No, sir; not right away. Didn't feel like eating anyway.

Q. Well, what I meant by that was, did you take your lunch period at that time?

A. Afterwards, after they had removed Mr. Affolder.

Q. When you—after he had been removed and after you came back to work from your lunch period, and between that time and the time the accident happened, did anybody move any of the cars on the track?

A. No, sir, not to my knowledge, they didn't. We didn't.

Q. Well, you were the only engine working that part of that yard?

A. Well, at that end of the yard, at that particular place. There was an engine—there were engines supposedly working at the other end of the yard.

Q. What I am trying to get at, there wasn't any other engine in that end of the yard moved these two cars?

A. No, sir.

[fol. 59] Q. And they were not moved by your crew?

A. No, sir.

Q. Now, following the accident, was there any talk—I don't want to know what it was, but was there any talk as to the cause of the accident at the time?

A. I did not hear any myself. I did not care to know too much about it.

Q. Did a claim agent from the railroad company come around and talk to you, ask you what you knew about the accident?

A. About two or three days later, two days later I believe he came.

Q. Mr. Ferguson that was? A. Yes, sir.

Q. And did you give him a statement two or three days later, following the accident?

A. Well, I give him a statement and I told him I was getting ready to go home and get some painting done, and he took it the next morning.

Q. He took it the next morning?

A. That is right. We couldn't agree on the statement, so he just tore it up and took it the next morning. The first statement that was made and I wanted a few changes in it, and I don't know—I guess he was pretty busy too, so we just let it go until the next morning; I think it [fol. 60] was the third morning after the accident happened I made the statement.

Q. Well, did you give a statement to him the next morning? A. Yes, sir.

Q. And was that statement correct? A. Yes, sir.

Q. You mean you agreed to that? A. Signed it.

Q. Well, what I am trying to say is, anything that was in this statement was true, as far as you know?

A. Yes, sir.

Q. At that time? A. That is right.

Q. Now, did you say anything to the investigator for the railroad at that time concerning a bent operating lever bracket on the Pennsylvania hopper car?

Mr. Eagleton: One minute, please. I object to that as being wholly immaterial, what he said to the Pennsylvania claim agent, not binding on the plaintiff, and if he said anything that was contrary to what he said here and is contained in a statement which has been signed, the statement would be the evidence of it.

The Court: The objection will be sustained, if you are asking the question for the purpose of impeachment. [fol. 61] I don't think it is in proper form.

Mr. Hocker: I offer to prove by this witness that if he were permitted to answer the last question he would tes-

tify that he made no statement to the claim agent to the effect that there was a bent operating lever bracket on the Pennsylvania hopper car, or that there was any other defect known to him in any of the cars.

Mr. Eagleton: Same objection for the reasons assigned.

The Court: Let's hear the offer, Mr. Reporter. Bring your book up here.

(The said offer of proof which had been made out of the hearing of the jury and the Court was repeated to the Court by the reporter.)

The Court: Well, I think your offer is much broader than your question was. If you desire to elicit from this witness that he said anything to the claim agent that was contradictory to what he has testified in court, you may ask him the specific question, and you will be permitted to do that. I do not intend by this ruling to estop you from contradicting this witness if you can do so by anything that transpired between him and the claim agent. I [fol. 62] am sustaining the objection to the previous question because it is too general. The objection to the offer is sustained because it is not in accordance with the question.

Mr. Hocker: Perhaps I misunderstood your Honor.

Q. Did you say anything to the claim agent about a bent operating lever bracket on the Pennsylvania hopper car?

Mr. Eagleton: I make the same objection, for the same reason, that it would not be binding on the plaintiff, what took place ex parte plaintiff, and that any failure to say something is not the equivalent of a matter of specific impeachment where he said anything to the contrary. In other words, I thought that was your Honor's ruling in the matter.

The Court: It was. Sustained.

Mr. Hocker: May my previous offer of proof go to that effect, your Honor?

The Court: I will make the same ruling, for the same reason, on your offer of proof.

Q. Did the claim agent ask you whether there was any defect on any of the cars there that you noticed, Mr. Tielker? A. I don't believe he did, sir.

Q. Did you tell him whether or not you had made any inspection of the cars?

A. As near as I can recall, I believe I answered that by [fol. 63] saying no.

Q. You said you made no inspection of the cars?

Mr. Eagleton: What he said here.

A. No. To the claim agent.

Q. Did you know why the claim agent was interested in whether or not you made an inspection of the cars, Mr. Tielker?

Mr. Eagleton: I object to that. He should know why the claim agent was interested.

The Court: Sustained.

Q. Well, what did you say, to have him understand by your statement that you made no inspection of the cars?

A. Well, after the accident happened, I believe that was his intent and purpose, to ask what I seen of the accident there after the accident had happened; that was my—that is what I figured he would.

Q. And you told him you made no inspection of the cars? A. That is right.

Q. Did you make any other report to any representative of the railroad respecting the Pennsylvania hopper car, and the coupler, and the operating lever, and the bracket?

A. No, sir.

Q. You did not? A. No, sir.

Q. The first time you ever told an investigator for the [fol. 64] railroad or anybody from the railroad about that was when Mr. Eagleton took your deposition in Fort Wayne last April, is that not so? A. That is right.

Q. And so far as you know, that was the first time that anybody representing the railroad knew that you had had difficulty in opening this knuckle on the east end of the Pennsylvania hopper car?

Mr. Eagleton: I make the objection that his knowledge of what they knew would be immaterial and improper.

The Court: Sustained.

Q. Now, you had talked to Mr. Eagleton, had you, about this matter previous to your deposition being taken?

A. Yes, sir. He came to Fort Wayne, and some time in —it seems to me like it was the middle of January, somewhere around there.

Q. The middle of January, of this year? A. That is right.

Q. And were you introduced to him? A. Yes, sir.

Q. Did a man by the name of Rassieur introduce you to him? A. No, sir.

Q. Who did, do you recall?

A. He introduced himself. He said he was representing [fol. 65] Affolder in this case.

Q. Did you tell him about that there was some difficulty in operating the lift lever on the hopper car? A. Yes, sir.

Q. And you had not at that time and continuously on through last April, you told nobody in the railroad about any difficulty in operating that lever? A. No, sir.

Q. When you opened the knuckle on the Pennsylvania hopper car, you did so by lifting this left lever, is that right? A. That is right.

Q. And would you say it took you two or three pulls to open it?

A. Well, it come up so far, but the pin doesn't pull up; after you get it all the way up, it pulls the knuckle.

Q. Well, were you able to lift it all the way up?

A. Yes, after about two or three pulls.

Q. After two or three pulls, did you say? A. Yes, sir.

Q. So that for the two or three pulls, the brake was bent, didn't loosen up, as far as you could judge, made it hard to rotate the lever? A. That is the bracket?

[fol. 66] Mr. Eagleton: He didn't say brake.

Q. Made it hard to rotate the lever?

A. I would say so, yes, sir.

Q. But you were able to rotate the lever?

A. Finally got the pin open, yes, sir.

Q. Then when you opened the pin, you put the lever back down? A. That is right.

Q. Did it fall down, or do you remember?

A. It fell down, as far as I can say.

Q. It fell back down? A. That is right.

Q. And it was in good normal operating position when you left it? A. Yes, sir.

Q. Now, the only thing you noticed wrong with this bracket was—with the coupler and the whole end of the car, was this bent bracket, is that right? A. Yes, sir.

Q. Now, then, Mr. Tielker, when you found out that there was a bent bracket, did you do anything about it towards finding out, getting the car repaired, or anything of that sort? A. No, sir.

[fol. 67] Q. Did you look to see whether the car had been bad ordered on that account?

A. I looked at the bad order tag, but I believe it was in bad order for that account. I don't recall just exactly.

Q. I thought you testified at your deposition that you looked at the bad order tag and it was marked bad order on account of the bracket?

A. I seen the bad order tag. I don't recall whether I testified one way or the other.

The Court: Announce a recess.

(At this point, a recess was had until 2:00 o'clock p. m.)

After recess, at 2:00 o'clock p. m., on June 8, 1948, the jury being present, the following proceedings were had:

Mr. Eagleton: May it please your Honor, I have another witness, a doctor, I wanted to call, but if Mr. Hocker only has a question or two for Mr. Tielker, I will be glad to recall. How about that? Will it be more than that, Mr. Hocker?

Mr. Hocker: I have about concluded my testimony.

Mr. Eagleton: Well, have Mr. Tielker come around again then and take the stand.

[fol. 68] It will only be a minute or two, Doctor.

(The witness Tielker resumes the witness stand.)

Cross-Examination (resumed).

By Mr. Hocker:

Q. Mr. Tielker, how long have you known Floyd Affolder?

A. Ever since I started my employment with the Nickel Plate. 19—January 25, 1941.

Q. And you and he were working on the same crew a good part of that time?

A. Well, we had been on different jobs together; that is right. We were both comparatively new fellows: It so happened that we might hit the same job together.

Q. You went to work about the same time for the Nickel Plate, didn't you, you went to work the same month?

A. I went to work in January, but as far as I could figure out, he was later in seniority than I was.

Q. Did you know him in a social way, as well as at work?

A. No, sir. I never went over to his house and he never came over to my house.

Q. Had you talked to anybody about this bent bracket, between the time of the accident and the time you spoke to Mr. Eagleton about it in the middle of January

A. No, sir.

Q. If you are mistaken about it, and if you did not open [fol. 69] that knuckle on the Pennsylvania car before it was kicked in, and if the knuckle on the Pennsylvania car was closed when the car went down the eastbound main and made contact with the Rock Island box car, would you expect the coupler to make or not?

A. That is owing to how hard the Rock Island car coupled on to the main drag.

Q. You mean as to whether it was sufficient?

A. I didn't know if it closed, whether the knuckle of the Rock Island was open or closed, that is right.

The Court: I did not understand your answer. Will you repeat that?

The Witness: Well, if the east knuckle of the car that we were kicking down the track was left closed, the coupling—there might be two closed knuckles. In other words, the car prior to this one that went down the track, the west knuckle on that, of course, was open when it was left go of, but when it hit, it might have a tendency to close.

Mr. Eagleton: Hit at the other end of it?

The Witness: That is right.

Q. Well, in other words, if the two knuckles were closed together, of course you would not expect the coupling to [fol. 70] make? A. No.

Q. Suppose the two cars were kicked together with both knuckles closed, following the accident would you expect to find the knuckles closed or open, or one of them closed or one of them open?

Mr. Eagleton: I object to that, what he would expect to find following any accident, if the Court please, for many reasons.

Mr. Hocker: I will withdraw the question. I did not mean following the accident.

Q. If you kick two cars together, and both knuckles, whether they are closed or not, would you expect to get—how would you expect to find the knuckles after the impact, closed or open? A. They would both be closed.

Q. Both be closed. Do you know how they were found in this accident?

Mr. Eagleton: Your own knowledge.

A. As far as I can tell, they were both closed.

Q. Both closed.

Mr. Eagleton: I object to that, if the Court please, and move it be stricken out, unless it be of his own knowledge. In other words, he said that he did not inspect the cars [fol. 71] after the accident at any time between the time he sent them down there.

The Court: What is the basis of your answer?

The Witness: Well, the coupling did not make. That would be my knowledge.

The Court: Well, did you see them?

The Witness: No, sir.

The Court: Sustained. Stricken out.

Q. Now, if the lock on the inside of the coupler—that is what you call the little piece of metal that holds the knuckle closed, and lock signal, or do you call it a pin?

A. Well, the pin has something to do, most to do with the knuckle staying closed.

Q. Did you ever take a knuckle apart, take a coupler apart? A. Yes, sir.

Q. Do you know how it is constructed inside?

A. I have done it already. I haven't done it very often but—

Q. Well, let's call this piece of metal in here that drops in behind that knuckle, the lock, I think that is a proper name for it; sometimes you call it the pin, but properly speaking, the pin is a hinge pin of the knuckle?

A. Well, when we talk about a pin, we are not talking about that pin there.

Q. You are talking about the lock? A. That is right.

[fol. 72] Q. Well, let's call that "lock" here, for clarity's sake. If the lock were held up by some defect in the coupler, then if the knuckle were closed, it would not lock; is that not so, if the lock itself were held up by some defect in the mechanism, the knuckle would not lock when it was not closed, is that not so? A. That is true.

Q. And if the coupling failed to make, because the cars were stuck together and something was wrong with the mechanism so that the lock did not drop, you would expect to find the knuckle after the impact open or closed?

A. You mean—you mean before any other car hit that car?

Q. Immediately after the impact, you kick the car down there and you don't make the coupling because of some defect in the lock, let us say.

A. Well, ordinarily, that knuckle there would—it would be open, it would bounce back, but the next car coming down would more than likely jar it shut.

Q. That is right. But after the impact, the knuckle would be open, is that right? A. Open, that is right.

Mr. Hocker: I believe that is all.

Redirect Examination.

By Mr. Eagleton:

[fol. 73] Q. You said, in answer to Mr. Hocker's question that last question, that after the impact you would expect to find, if you were right down there after the impact, you would expect to find the knuckle open, if you were right down there, and then another car coming behind that one would knock that closed, is that right, or could knock that closed? A. Ordinarily, yes, sir.

Q. And with this car, twenty-sixth car, when you sent

it down there at the east end, the knuckle on that, the Pennsylvania hopper car, you opened it yourself?

A. That is right.

Q. And you say that you remember having difficulty in opening it? A. Yes, sir.

Q. On account of the operating lever bracket, is that right? A. That is right.

Q. And then after the twenty-sixth car—

Mr. Hocker: (Interrupting) I will object to the continued leading and suggestive form of the questions, your Honor.

The Court: Sustained.

Q. After the twenty-sixth car went down, that is the Pennsylvania hopper car, were there other cars that came down in back of it and hit, let us say, before the shove [fol. 74] movement was made?

A. Yes, sir; there were two, I believe.

Q. Two other kick movements?

A. Well, whether they went down singly or together, I can not recall. I believe they went—I couldn't say.

Q. Well, in other words, there were two cars in back of the twenty-sixth car, which would make that the twenty-seventh and twenty-eighth cars sent down to the east and hooked on to the west end of the Pennsylvania hopper before the shove movement was made?

A. That is right.

Q. And then on top of the kick movements, whether it was one or two kick movements, you did have a shove movement made by the engine, and then it was shoving the whole train together?

Mr. Hocker: Just a minute. If your Honor please, I will object again to the leading and suggestive form of the question.

The Court: Sustained. I think it is repetition.

Q. That is a fact, is it not, Mr. Tielker?

Mr. Hocker: I object to the form of the question, your Honor.

The Court: Sustained.

Mr. Eagleton: I will withdraw the question.

[fol. 75] Q. State whether or not, in addition to kick movements that were made for the twenty-seventh and twenty-eighth cars, following the car No. 26, the Pennsylvania hopper car with which you had the difficulty with the operating lever bracket, there was a shove movement made subsequent to those two kick movements.

A. Well, whether it was one or two kick movements, there was still a shove movement, that is right.

Q. And in that shove movement, I will ask you whether or not the whole train was shoved together.

A. Yes, sir.

Mr. Eagleton: All right. That is all.

Recross-Examination

By Mr. Hocker:

Q. Let me ask you this question: with reference to the tendency to couple, is there a more likely coupling on an impact between an open knuckle and a closed or open knuckle, as the case may be, pushing on the inside of the knuckle, or is there more likelihood of coupling by striking at the other end of the car? Which is most likely?

A. I don't believe I get your question.

Q. If we were hypothesizing the possibility that there was something wrong with the coupler which prevented the lock from locking behind the knuckle—that is what [fol. 76] we were talking about a minute ago, was a possibility?

Q. And you said that if there was such a difficulty with the knuckle, or with the coupler itself, and the pin was prevented from locking, that the lock was prevented from dropping behind the knuckle when it was closed, that after the failure to couple had occurred, the knuckle would be opened up, that is right? A. It would be, yes, sir.

Q. And then you said that it might be that a subsequent kick would close the knuckle, is that right? A. Yes, sir.

Q. But let me ask you then, would there be a greater shock to the coupling mechanism and to the pin by the coupling itself or by striking at the other end of the car.

A. Well, the coupling itself should be the greater shock.

Q. That is right.

A. Because we were switching very slowly.

Q. That is right. So that if the pin failed to drop on

the coupling movement, would it be likely that the pin would fall or drop, or would drop subsequently if it were struck at the other end of the car? A. No, sir.

Mr. Hocker: That is all.

Redirect Examination

[fol. 77] By Mr. Eagleton:

Q. Mr. Tielker, in that connection, if the shove movement is made and your knuckle is still open when you shove, after you get through trying to couple by impact, and it is not made, you understand, and your knuckle is open: now, when you shove your train, and necessarily, in order to shove the train from the west, you necessarily bring this coupling at the east end of that car in contact with the west coupling of the Rock Island car, don't you, in the shove move?

Mr. Hocker: I object to the suggestive form of the question, your Honor.

Mr. Eagleton: I am asking that question based on facts that he summarized.

The Court: I will let him answer the question.

Q. Is that your understanding? A. Yes, sir.

Q. So that you do make contact in a shove movement between the east end of that hopper car and the west end of the Rock Island car, is that right? A. Yes, sir.

Mr. Eagleton: That is all.

Recross-Examination

By Mr. Hocker:

Q. But you did not make any contact with the lock [fol. 78] inside, did you? All you make contact with is that knuckle. The lock is inside, isn't it? A. That is right.

Q. And if there is anything holding the lock—let's see if we can hold that test right here—suppose we make it. You can open and close that knuckle all day and it won't work, isn't that right (demonstrating)?

A. That is right, holding it that way.

Q. If there is something holding up the lock. Now, you, as I understand your testimony, you say after you opened that knuckle, the operating lever fell back down?

A. To my knowledge, it did, yes, sir.

Mr. Hocker: All right. That is all.

Mr. Eagleton: That is all, Mr. Tielker.

The Court: You are excused.

[fol. 79] I. J. SIMON,

a witness of lawful age, being duly produced, sworn and examined on behalf of the plaintiff, deposeth and saith:

Direct Examination

By Mr. Eagleton:

Q. Will you please state your name to the Court and the jury? A. I. J. Simon.

Q. And what is your business or profession?

A. I am a surgeon.

Q. Of what medical school are you a graduate?

A. St. Louis University.

Q. And what year? A. 1928.

Q. And after your graduation, Doctor, and since that time, what other work have you done in connection with your profession and in qualifying yourself as a surgeon?

A. I had five years' training in the City Hospital immediately following my graduation. I went into private practice in 1933 and practiced the private practice of surgery until 1941, when I entered the navy and—

Q. (Interrupting) Did you have surgical work in the navy, too, Doctor?

A. Yes, sir. I was in surgery in the navy until November, 1945, when I returned to St. Louis and have again engaged in private practice.

[fol. 80] Q. And just briefly, what in the navy, what were you in charge of, any hospital, or post, or anything of that kind?

A. I was chief of the surgical section at New Orleans Naval Hospital in 1945.

Q. And when you were discharged? A. Yes, sir.

Q. Had you done some overseas surgery, too, had you?

A. Yes, sir. I had twenty-one months overseas.

Q. I see. Well, now, Doctor, at my request the other

day, I believe it was one day last week, possibly Friday of last week, you made an examination of this plaintiff, did you? A. Yes, sir.

Q. Will you tell us briefly, in your own way, what you found, particularly with reference now to his right leg, the one that was amputated, and give us your description of what remains and what its condition is, and so forth?

A. I found a traumatic amputation, one that was caused by injury, in the upper third of the right thigh, and the stump measured four inches.

The scar on the bottom of this stump was very highly adherent to the bone in the center of the remnant of the right thigh and was painful. There was a great deal of pain in the flap of skin which lay on the inner side, and this what we call the medial flap was quite painful and [fol. 81] contained what we call a hot spot, meaning a very localized point of tenderness which is exceptionally painful and usually indicates a little tumor of the end of the nerve, which is common in these traumatic amputations.

There were many scars running transversely, that is, across the thigh, and vertically up what was left of the thigh, in a vertical direction, and across this stump.

On testing this stump for movement, and muscle power, and so on, I found that extension of backward movement of the leg was nil. The man could not move this stump in a backward direction at all.

Flexion, or a bending movement of the thigh on the abdomen, that is what we call bending the hip and abduction movement in an upward direction, amounted to between fifty and [six] per cent of the normal.

Ability to move the stump inward and towards the other leg, the abduction was about, roughly, eighty per cent.

The gentleman also had an irritation of the skin, so-called "adhesive tape dermatitis", just left of the groin, right where the thigh joins the lower portion of the abdomen.

He wore a dressing, a compression dressing, which had been secured with adhesive tape and had been present, [fol. 82] I understand, since his injury.

Q. Doctor, you only saw him the one time, just for the purpose of examining, at my request, so that you might be able to testify here to your findings, is that right, Doctor?

A. Yes, sir.

Q. He is not a patient of yours? A. No, sir.

Q. Doctor, when you speak of this loss of muscle power, with reference to extension, I believe you said it was totally gone, and with reference to flexion it was fifty to sixty per cent remaining, meaning it was forty to fifty per cent lost, and with reference to abduction eighty per cent remaining and twenty per cent lost, is that right? A. Right.

Q. Is that loss of muscle power a permanent loss of muscle power, as far as the stump is concerned? A. Yes, sir.

Q. With reference to his present ability to use any kind of an artificial limb, has he any present ability, with the stump in its present shape, to use an artificial limb?

A. He will be able to use an artificial limb, which will be not the ideal type of limb, inasmuch as the stump is so short.

[fol. 83] Q. I was coming to that. First, its present condition, before any further surgery is performed, or at present, could he put an artificial limb on there, with this hot spot and the exposure of the bone, and the skin as it now remains? A. No. It would be very painful.

Q. What will have to be done then, before any thought of an artificial limb can be executed, at least has to have more surgery? A. Yes.

Mr. Hocker: I will object to the leading and suggestive form of the question, if your Honor please.

The Court: Sustained.

Q. What, Doctor, if any, surgery is recommended by you, with reference to his present condition?

A. The first of all, the bone will have to be shortened, because of the adherence of the scar on the bottom of this stump.

The scar itself will have to be taken out, because it was very painful, and there will be a lot of undermining and release of a great deal of scar tissue, which has affected the feeling in the present state of the stump, before this man can expect relief from these symptoms, which he now has.

Q. Now, Doctor, you started to say, and I believe I [fol. 84] interrupted you before you had completed your thought, that an artificial limb—something about its use being not so good as ordinarily. What was that you said or had in mind?

A. Well, let's begin with the ideal stump. I mean when one does an amputation by choice, for one disease or another, there are conditions in which one elects to do amputations, in which the patient is suitably prepared and the body extremity is tested and observed so that we are fairly sure beforehand that good healing will occur. In other words, conditions are ideal for an amputation. We would do that amputation, if not immediately above the knee, if it were in the case of hardening of the arteries, we would do that amputation in such a way as to leave a stump with a minimum of seven inches—I mean the longer the stump was, the more efficient the use of the artificial limb, and seven inches represents about the minimum of a good, useful, functioning limb. Above, anything shorter than three inches, one can not use a limb at all, without a great deal of, oh, ingenuity on the part of the limb maker, he has to make a sort of a table to rest up in, that short stump and so on.

Q. Now, in this man's sort of stump that is left remaining, in the event there is surgery, further surgery to relieve him of the immediate conditions, what sort of an appliance will it necessarily have to be, and to what limitations [fol. 85] will it be exposed?

A. Well, the appliance, I believe, in this case will necessarily have to have a sort of table arrangement in which no weight-bearing can be expected of the stump itself. The weight will have to be borne on a sort of a rim which will fit around the stump, but will have to be secured in some way to the pelvis, so that the man will rest on this shelf-like arrangement, which will have to go on top of the stump—of the rim.

Q. What is the fact with reference to the wearing of such a device itself under any circumstances, a table-like device fitted to and around the pelvis, what will the effect be on the individual, in so far as discomfiture and pain is concerned?

A. Well, of course, it is not comfortable at best, and requires considerable physical exertion to lug this thing around, you see.

Q. I see. Doctor, he testifies, and I want you to assume that the testimony is true and correct in that respect, from a hypothetical standpoint, that ever since this accident he has had constant pain, worse at night than in daytime, in

this stump, that it feels as though his toes were wiggling or moving, and that he is sitting on his heel, and at times the stump itself will flop up, and that his nerves are [fol. 86] wrecked, that under those circumstances he can not rest and has to get up every evening and take aspirin, and has crying spells and things along the line of nervous reaction: I will ask you, upon that assumption or that hypothesis, what is there in this man's condition, if anything, that would account for that chain of symptoms that I have just expressed to you?

A. Oh, that is a rather constant finding, I would say, in this type of injury, particularly in a man thirty-five years old; it is analogous to a good many of the combat cases that I saw during the service, that not only had physical symptoms to treat, but there is a great deal of mental shock and anguish accompanies a situation of this kind that requires treatment for a long, long time.

Mr. Eagleton: I see. I believe that is all, Doctor.

(Mr. Hocker arises to start his cross-examination.)

Mr. Eagleton: May I just interrupt, if you don't mind, Mr. Hocker? I want to ask Doctor Simon another question, if the Court please, I have thought of.

Q. Upon the assumption that he has had pain and suffering in this limb, and to the extent otherwise, nervous, as mentioned, is it your judgment—state what your judgment is, rather, with reference to whether or not he is [fol. 87] reasonably certain to continue to suffer pain and symptoms of this type in the future? A. I would say yes.

Mr. Eagleton: I believe that is all.

Cross-Examination.

By Mr. Hocker:

Q. Doctor, this injury is now less than ten months old. That is your understanding, isn't it?

A. Yes, sir. This September.

Q. Did you understand what treatment he had had since the accident? A. We talked about that. Yes, sir.

Q. Do you know that he had two doctors and surgeons, hospitalization, ever since, nursing care, plasma and blood, and all that goes with such a severe injury, is that right?

A. Yes, sir.

Q. Did he tell you who bore the expense of that treatment? A. Well, we did not discuss that.

Q. Is this—considering the injury that you saw, is this a good result, would you say, so far?

A. Well, considering the extent of the trauma and the manner in which it occurred, I would say that the situation at present lends itself to further revision—I mean he will be able at pretty nearly any time to undergo further [fol. 88] treatment.

Q. That will make it possible for that stump to be used without being so painful? A. I don't know.

Q. Well, that is the purpose of the further treatment?

A. That is what the object will be. It will certainly be aimed at an attempt—it will be an attempt to improve the present conditions.

Q. That is right. Now, you have done work of that kind—haven't you, Doctor? A. Yes, sir.

Q. You are not an orthopedist, as I understand? A. No.

Q. An orthopedist devotes most of his time to that type of work, does he?

A. Well, the orthopedist treats injuries of the bony structures.

Q. Do you call such a limb as that an orthopedic appliance? A. Prosthetic appliance.

Q. A prosthetic form? A. Yes.

Q. You would naturally expect, within ten months after an injury of that sort, in any event, considerable pain in [fol. 89] the stump, would you not? A. Yes, sir.

Q. And you would, of course, expect improvement after ten months, would you not?

A. Not necessarily, because—I assume you want me to explain that—

Q. Sure.

A. Because a scar tissue, by its very nature, causes shrinking and contracture, and this skin and scar tissue, which is now closely incorporated into the end of this bone, is so tight now that it accounts for a great part of his symptoms, and that is just going to continue.

Q. Until that scar tissue is loosened, did you say?

A. Until the scar tissue is loosened and until the bone is shortened. The scar tissue will have to be largely excised, and then when you cut it away, you get more scar tissue. It is like operating for adhesions.

Q. Well, at least you do intend to do an operation—it is understood, Doctor, that you will not, but you would recommend that that be done, I mean to say?

A. That should be done.

Q. That should be done, and it is expected to be done, is that not so? A. Well, I would assume so. I don't know.

Q. Well, he was told to return by Doctor Stauffer, the [fol. 90] orthopedic surgeon, is that so, did he tell you?

A. I don't know.

Mr. Eagleton: He doesn't know that.

Q. You don't know he was supposed to return?

A. He told me he was under treatment and is still under treatment by Doctor Stauffer.

Q. That he was still under treatment by Doctor Stauffer? A. Yes.

Q. He told you that? A. Yes.

Mr. Hocker: That is all.

Mr. Eagleton: That is all, Doctor. Thank you very much.

[fol. 91] Mr. Eagleton: If the Court please, I want to offer and read in evidence certain answers to certain interrogatories that I filed in the case. The first one I will read is the interrogatory numbered 1, so as to get the car number, then I will read the letter (referring to the alphabetical lettering of the subdivisions of interrogatory 1) that applies to that particular one.

Interrogatory No. 1—by way of explanation, these are questions that are submitted to the defendant prior to trial for answer, and that the defendant answers in a pleading that is filed in court, and I am reading these particular questions that were asked and the answers that were given by the defendant.

The first question, interrogatory numbered 1:

"Give the following requested information concerning the Pennsylvania hopper car No. 727512, which was kicked by the defendant into the eastbound main track on the day of and prior to plaintiff's injury:

"A. State the time when defendant first accepted possession and control of said car prior to plaintiff's injury."

The answer to that is:

"5:45 p. m., September 16, 1947."

"D," under question 1, that would be No. 1-D, the interrogatory.

[fol. 92] The Court: What was the other answer?

Mr. Eagleton: The other one was—that first one, your Honor, is merely the formal question?

The Court: I mean, when you read three, what was the answer?

Mr. Eagleton: A—1-A. This is 1-D:

"Set forth in detail each and every separate movement and place of movement of said car from the time defendant first so accepted it until it was placed on a repair track for the purpose of being repaired after plaintiff's injury, in that chronological order."

Then that is set forth in the answer to 1-D, as follows, reading across:

"Departed from Station, Claypool, September 17, 11:30 a. m., arrived at Argos, 9/17, 2:35 p. m., Train Ex. 657."

Next:

"Departed from Station, Argos, September 17, 4:25 p. m., arrived at Station, West Wayne, September 17, at 8:55 p. m."

The Court: Where is Argos? I suppose if I had a map, I could find that out, but can you tell me? Is it in Indiana?

Mr. Eagleton: Argos, in Indiana?

[fol. 93] Mr. Hocker: That is right.

Mr. Eagleton: Claypool.

The Court: Also in Indiana.

Mr. Eagleton: I assume that Claypool, Argos, West Wayne, and Peabody, and back to Argos again—

Mr. Hocker: All in Indiana.

Mr. Eagleton: All right. The second one was:

"Argos, 9/17, 4:25 p. m., arrived at Station, West Wayne, 9/17"—that is September 17—"8:55 p. m., on Train Ex. 657."

"Departed"—next movement—"9/18, 8:55 a. m., arrived at Peabody, Indiana, September 18, 9:40 a. m., Train Ex. 731."

Next movement:

"Departed from Station, Peabody, on September 23, at 9:05 a. m., arrived at Argos, Indiana, September 23, at 2:55 p. m., on Train Ex. 735."

And then the last movement:

"Departed from Argos on September 23, 4:05 p. m., arrived at Station, West Wayne"—

West Wayne Station, that is in Indiana?

Mr. Hocker: The same.

Mr. Eagleton: Right outside Fort Wayne?

Mr. Hocker: Fort Wayne.

[fol. 94] Mr. Eagleton: "On September 23, at 6:05 p. m., in Train Ex. 735."

Now, the next one is:

"G. State when said defect or defects"—

I better read "F", to make it correct:

"F. State the exact nature of the defect or defects for which said car had been so bad-ordered by defendant."

The answer to interrogatory 1-F:

"For repacking of journal boxes as provided by AAR Rule No. 66."

Interrogatory No. 1-G:

"State when said defect or defects were first discovered by defendant, and where said car was then located."

Answer to interrogatory 1-G:

"Between 6:00 and 7:00 p. m., September 23, 1947; car then in Fort Wayne yards."

The next is interrogatory 1-I:

"Attach hereto a verbatim copy of the contents and notations on the bad-order card which was on said car at the time of and prior to plaintiff's injury."

And that is attached and it shows this is the bad-order car prior to the plaintiff's injury; about what car, it shows PRR—

[fol. 95] Mr. Hocker: (Interrupting) Wait a minute, if your Honor please. If this to be used here, I have no objection to reading the entire card or showing the entire card to the jury, but I object to any commentation of what it shows.

Mr. Eagleton: I want to offer what it shows, if the Court please.

Mr. Hocker: We are going to object to reading the back of it. That is not the bad-order card. He has a right to read the front of it, where it says "bad order," just tacked to the side of the car.

Mr. Eagleton: Well, I wish to read, if the Court please, the record that is contained in the interrogatories and to offer this bad-order card which is made an exhibit in answer to interrogatories, and read this portion of it that has to do with this matter.

Mr. Hocker: Well, I object to you reading.

Mr. Eagleton: Well, I think you should read the entire card.

Mr. Eagleton: Well, the entire card—I want to take this pin out of here.

Mr. Hocker: Go ahead.

Mr. Eagleton: The entire card, if the Court please—I will show this to you.

Mr. Hocker: I don't care about reading the printed [fol. 96] part.

The Court: I mean only the parts that are filled in. All these blanks down here that are not filled in—

Mr. Eagleton: (Interrupting) If you could tell me.

(The Court points out and explains to Mr. Eagleton.)

The Court: I think I would read all of the reverse side.

Mr. Eagleton: How much of this side? I don't quite know.

The Court: I will read this (indicating).

Mr. Eagleton: The bad-order card has two sides, as you can see, that is the one side (indicating), this is the other, and I think I will hand it to the jury and let them look it over themselves, and on the front side, if I call that the front—

Mr. Hocker: (Interrupting) Excuse me, Mr. Eagleton. You are not using the original bad-order card. If it is offered in evidence, I suggest it be identified as an exhibit, so we will have it in the record as an exhibit. I have no objection to showing it to the jury.

Mr. Eagleton: All right. I will have this marked Plaintiff's Exhibit A.

(The said card was marked by the reporter as [fol. 97] Plaintiff's Exhibit A.)

Mr. Hocker: How about the reverse side? Did you mark that?

Mr. Eagleton: I did not mark it. It was not necessary. Plaintiff's Exhibit A, I now offer it in evidence, if your Honor please.

Mr. Hocker: No objection.

Mark Defective Part [X]

Form L. 156 CNP 6-49
Made in U. S. A.

BAD ORDER

Car Initial PRR Number 227512

Send this Car to Repair Track for following Defects:

LOAD [ ] EMPTY [X]

[ ] Air Brakes	[ ] Coupler Knuckle	[ ] End Defective	[ ] Sill, Center	[ ] Truck Bolster
[ ] Boxes Re-packed	[ ] Coupler Pin	[ ] Floor Defective	[ ] Sill, Side	[ ] Wheel, Worn Flange
[ ] Brake Beam	[ ] Coupler Lock	[ ] Hand Holds	[ ] Sill, End	[ ] Wheel, Slid Flat
[ ] Brake Hanger	[ ] Coupler Opr. R. Lever	[ ] Hand Rails	[ ] Siding	[ ] Wheel, Broken Flange
[ ] Box Bolts	[ ] Coupler Carrier Iron	[ ] Journal Box	[ ] Sill Step	[ ] Wheel, Broken Rim
[ ] Brake Rod	[ ] Coupler Yoke	[ ] Journal Hot	[ ] Side Bearing	[ ] Wheel, Hollow Tread
[ ] Brake Pipe	[ ] Cross Tie	[ ] Ladders	[ ] Side Defective	[ ] Wheel, Loose
[ ] Brakes, Hand	[ ] Center Pin	[ ] Load Shifted	[ ] Springs	[ ] Wheel, Worn Chill
[ ] Center Plate	[ ] Draft Gear	[ ] Rack, Auto	[ ] Spring Plank	[ ] Wheel, Brake Burn
[ ] Coupler Cross Key	[ ] Draft Lugs	[ ] Roof	[ ] Stake	[ ] Wheel, Out Round
[ ] Coupler Defective	[ ] Doors	[ ] Running Board	[ ] Truck Side	[ ] Wheel, Cracked Plate

Other Defects Released Brakes

Place _____ Date 9-14 19 47

From Train No. _____

Inspector.

ORIGINAL

RECORD OF REPAIRS

Car No. PAR Kind of Car _____

Car No. 227512 Class _____

Card	REPAIRS MADE	Who Made
	RE Upset Center Plate	Clerk
	RE Welded Grabiron	Clerk

Signature _____

Party authorizing repairs

To state when damage is due to derailment, examining the above telescoping or other handling line responsibility condition

Plaintiff's Exhibit A

[fol. 99] Mr. Eagleton: And I am reading, as the Court indicated on the front side, it says:

"Bad Order, Car Initial PRR Number—" that means Pennsylvania, I suppose—"727512."

It has got "X" marked against "Empty," so I take it it was empty. Then at the bottom it says:

"Other Defects Repack Boxes." "Place" is vacant, and the "Date" is September 24, 1947, and the signature is "George Seimik," I think that is.

Mr. Hocker: Yes, same answer as interrogatories.

Mr. Eagleton: He is car inspector. On the back it says:

"Original Record of Repairs. Initials PRR. Car No. 727512."

And at right-hand corner, it says:

"Date In." It has "6A"—I imagine that refers to 6:00 a. m.; it says "6A."

[fol. 100] Mr. Hocker: That means the repair track.

Mr. Eagleton: In, "Date In 9-24-47. Date Out 9-24-47." And then: "Repairs Made"—Now, will you interpret this here?

Mr. Hocker: That is the B end on the left side.

Mr. Eagleton: B end, operating lever.

Mr. Hocker: B end, left side.

Mr. Eagleton: That is, the "BL," the initials "BL" stand for the words "brake end left side." In other words, there is a brake end to a car, and I guess there is a right and left side to it, so "BL" refers to brake end at the left side, "operating lever bracket bent"—b-e-n-t. And then below that: "BL 1 side grab iron bent." And signature at the bottom is signature "EHB," it looks like, and also signature, "WAW."

Mr. Hocker: You can use this, if you want, in connection with that.

Mr. Eagleton: I want to get this through.

Now, reading from the same interrogatories—have you got that other card?

Mr. Hocker: Yes.

Mr. Eagleton: With reference to the Rock Island car, the first—or the second question that is asked with reference to the Rock Island car—

Mr. Hocker: Do you want the original?

[fol. 101] Mr. Eagleton: Yes, if you will. Interrogatory No. 2:

"Give the following requested information concerning the Rock Island box car No. 156067 which was kicked by the defendant into the eastbound main track on the date of and prior to plaintiff's injury:"

I want to read the answer to that question 2-D, and in line with that question rather than an answer to it, because that is a general question that is supplemented by interrogatory No. 2-D:

"Set forth in detail each and every separate movement and place of movement of said car from the time defendant first so accepted it until it was placed on a repair track for the purpose of being repaired after plaintiff's injury, in that chronological order."

If the Court please, here there [——] quite a number of dates which are definitely named, beginning with August 12th and running down to September 23d, and I only want to read the last item on the interrogatory, which is as follows:

"Departed From Station, Payne"—

Is that in—

Mr. Hocker: That is in Ohio.

Mr. Eagleton: "On September 23, 11:45 a. m., arrived at [fol. 102] Fort Wayne, Indiana, on September 23, at 1:15 p. m., on an extra train."

Now, the next interrogatory with reference to that question is 2-P. Interrogatory 2-P is as follows:

"State whether any defect or defects existed on said car at the time of and prior to plaintiff's injury which were not noted on the bad-order card or cards mentioned in Interrogatory No. 'I.'"

This is the answer to interrogatory No. 2-P:

"One new journal bearing applied; one second-hand type 'D' knuckle applied to replace cracked one."

Mr. Hocker: Here is A-1, the card.

Mr. Eagleton: I will mark that Plaintiff's Exhibit B.

(The said card was thereupon marked by the reporter as Plaintiff's Exhibit B.)

Mr. Eagleton: Plaintiff's Exhibit B is the bad order card with reference to this Rock Island car. On the front, it has nothing by way of answer, that is, it does not have the car initial or the number, or any other items, such as on the previous card, Exhibit A, but on the back of the card it has this:

"Record of Repairs. Initials RI, car No. 156067, Date In 9-28-47, Date Out 9-24-47," and under "Repairs," "End"—I don't know what that word "L4" means.

[fol. 103] Mr. Hocker: The fourth axle on the left side.

Mr. Eagleton: "L4", meaning, I suppose, the fourth axle, and it says:

"Repairs Made Ex Brass."

Mr. Hocker: Examined.

Mr. Eagleton: Examined Brass—B-r-a-s-s.

"Why Made: Brass"—

Mr. Hocker: Brass worn out, journal O. K. EHB.

Mr. Eagleton: "Brass worn out. Journal O. K." Then it has the same signatures appearing here, in the first space is "EHB, party authorizing the repairs", and "party checking the repairs, WAW."

Offer that in evidence along with the particular interrogatory.

Mark Defective Part [X]

Form L. 195 CNP 8-40
Made in U. S. A.

BAD ORDER

Car Initial..... Number.....

LOAD [ ]
EMPTY [ ]

Send this Car to Repair Track for following Defects:

[ ] Air Brakes	[ ] Coupler Knuckle	[ ] End Defective	[ ] Sil., Center	[ ] Truck Bolster
[ ] Boxes Re-packed	[ ] Coupler Pin	[ ] Floor Defective	[ ] Sill, Side	[ ] Wheel, Worn Flange
[ ] Brake Beam	[ ] Coupler Lock	[ ] Hand Holds	[ ] Sill, End	[ ] Wheel, Slid Flat
[ ] Brake Hanger	[ ] Coupler Opr. R. Lever	[ ] Hand Rails	[ ] Siding	[ ] Wheel, Broken Flange
[ ] Bay Bolts	[ ] Coupler Carrier Iron	[ ] Journal Box	[ ] Sill Step	[ ] Wheel, Broken Rim
[ ] Brake Rod	[ ] Coupler Yoke	[ ] Journal Hot	[ ] Side Bearing	[ ] Wheel, Hollow Tread
[ ] Brake Pipe	[ ] Cross Tie	[ ] Ladders	[ ] Side Defective	[ ] Wheel, Loose
[ ] Brakes, Hand	[ ] Center Pin	[ ] Load Shifted	[ ] Springs	[ ] Wheel, Worn Chill
[ ] Center Plate	[ ] Draft Gear	[ ] Rack, Auto	[ ] Spring Plank	[ ] Wheel, Brake Burn
[ ] Coupler Cross Key	[ ] Draft Lugs	[ ] Roof	[ ] Stake	[ ] Wheel, Out Round
[ ] Coupler Defective	[ ] Doors	[ ] Running Board	[ ] Truck Side	[ ] Wheel, Cracked Plate

Other Defects_____

Place_____ Date_____ 19___

From Train No._____

_____
Inspector.

RECORD OF REPAIRS

Date	Repairs Made	Initial

Signature_____
Party effecting repair.

Signature_____
Party making or billing.

So state when damage is due to derailment, coupling, switching, telescoping or other handling line responsibility questionable.

Plaintiff's Exhibit B

[fol. 105] Mr. Hocker: Are you through with the interrogatories?

Mr. Eagleton: Yes.

Mr. Hocker: I wish to read some other portions of the interrogatories not read by Mr. Eagleton, your Honor.

Mr. Eagleton: I don't know that the other interrogatories can be read. I object to the reading of any other interrogatories not offered by the plaintiff in plaintiff's case.

Mr. Hocker: As read piecemeal, your Honor, they [fol. 106] don't tell the whole story.

The Court: What interrogatories did you want to read?

Mr. Hocker: He has read only the portions of the bad-order cards, your Honor, interrogatories, he read A and B.

Mr. Eagleton: And "I" under "1" (one).

Mr. Hocker: And then he read "I", which is marked "A attached" under "1" (one), without showing the answer to F, G, or H, or K, L, M, and N, and O.

Mr. Eagleton: I did read F and G, if the Court please.

Mr. Hocker: Well, he did not read the others. All of these are explanatory, your Honor—you did read F and G—of the others.

The Court: I think you should offer one at a time, and then if there is objection, I will rule on it.

Mr. Hocker: Very well. Well, I propose to read "H" under "1" (one) now.

Mr. Eagleton: And I make the objection, if the Court please, that it makes no difference who made the repairs, in the first place immaterial, and in the second place—

The Court: Who discovered?

Mr. Eagleton: Who discovered it has got the initials [fol. 107] of the name of the man on the card, I read that,

read that off the card, but I make the objection that it is not explanatory of anything.

The Court: Objection overruled.

Mr. Hocker: Interrogatory—well, interrogatory G—well, F, these two that Mr. Eagleton read I am not going to read the answers first, I will read the interrogatories—

"F. State the exact nature of the defect or defects for which said car had been so bad-ordered by defendant."

The answer was:

"For repacking of journal boxes as provided by AAR Rule No. 66."

"G. State when said defect or defects were first discovered by defendant, and where said car was then located."

"Between 6:00 and 7:00 p. m., September 23, 1947; car then in Fort Wayne yards."

"H. State the name and address of the person who first so discovered said defect or defects."

H. is: "George Seimik, 2308 Hartman Street, Huntington, Indiana."

The next question, answer to which Mr. Eagleton—in answer to which Mr. Eagleton offered the card in evidence: [fol. 108] "Attach hereto a verbatim copy of the contents and notations on the bad-order card which was on said car at the time of and prior to plaintiff's injury."

The answer is:

"Attached."

"J. State whether the card mentioned in 'I' was a white card."

Answer: "Yes."

"K. State when the card mentioned in 'I' was placed on said car."

"Between 6:00 and 7:00 p. m., September 23, 1947."

"State the name and address of the person who placed said card mentioned in 'I' on said car."

"George Seimik, 2308 Hartman Street, Huntington, Indiana."

"M. State where said car was located when said card mentioned in 'I' was placed on it."

Answer: "In Fort Wayne, Indiana yards; exact location in yard not known."

"N. Specify exactly where on said car said card mentioned in 'I' was placed."

Answer: "On the 'Commodity Card Board.'"

"O. State whether there was a red-colored bad-order [fol. 109] card on said car at the time of and prior to plaintiff's injury, in compliance with the rules and regulations of the Interstate Commerce Commission respecting bad orders for safety appliance defects."

Answer: "No; as far as is known there was no safety appliance defect."

"Q. State whether defendant repaired the defect or defects on said car referred to on the white card mentioned in Interrogatory No. 'I.'"

Answer: "Yes."

"R. Where and by whom?"

"Between 7:00 a. m. and 3:00 a. m., September 24, 1947, in car repair yard, Fort Wayne, Indiana, by Virgil C. Panyard, 911 St. Marys Avenue, Fort Wayne, Indiana."

Mr. Eagleton: If the Court please, I object to that just for the purpose of saving time, not that I care particularly, but none of these questions or answers are explanatory of anything that I introduced at all. It is merely a list of the other interrogatories that are not explanatory, I submit.

The Court: Well, there isn't any interrogatory before the Court.

Mr. Eagleton: No. The answer has been read.

The Court: I said that if you would object, I would rule on them.

[fol. 110] Mr. Eagleton: Yes.

The Court: You ought to object before the interrogatory is read.

Mr. Hocker: Interrogatory S.:

"State whether any defect or defects existed on said car at the time of and prior to plaintiff's injury, which were not noted on the bad-order car mentioned in Interrogatory No. 'I'."

The answer is:

"None known. Depositions taken by plaintiff disclosed testimony of a bent pin lifting lever bracket."

Then with reference to the Rock Island car, under the caption of "2," and after the parts of when and where we accepted the car, and where it had moved:

"E. State whether said car had been bad-ordered by the defendant prior to plaintiff's injury."

Answer: "Yes."

"F. State the exact nature of the defect or defects for which said car had been so bad-ordered by defendant."

"F," the answer is:

"Bulging door."

"G. State when said defect or defects were first discovered by defendant, and where said car was then located." [fol. 111] "G. A few minutes prior to Affolder's accident while being switched at west yard, Fort Wayne, Indiana, by Affolder's crew."

Mr. Eagleton: Is that all?

If the Court please, by agreement of counsel, without the necessity of bringing the plaintiff to the stand, it may be shown in the record that plaintiff has not worked or earned since the date of his injury.

With that, the plaintiff will rest, if the Court please.

Plaintiff Rests.

The Court: Will counsel come up here?

(Here followed an off-the-record conference at the bench.)

Mr. Hocker: Let the record show, at the close of the plaintiff's evidence, the defendant files its motion for a directed verdict.

(The said written motion for a directed verdict is, in words and figures, as follows, to-wit:)

(Omitting formal caption.)

"Motion for a Directed Verdict.

"Defendant moves the Court to direct a verdict in its favor and for grounds of its motion states there is insufficient evidence to make out a claim upon which relief can be granted because,

[fol. 112] "1. there is no showing that defendant hauled or had in use, cars not equipped with couplers coupling automatically by impact, and

"2. there is no showing that plaintiff's injury was proximately caused by such a failure.

JONES, HOCKER, GLADNEY & GRAND
And
(Signed) LON HOCKER, JR.,
Attorneys for Defendant.

408 North Eighth Street,
St. Louis (1), Missouri,
GArfield 3850."

Which said written motion for a directed verdict was by the Court marked: "Ruling reserved. R. M. H."

The Court: Ladies and gentlemen, I will give you ten minutes' recess.

(Recess, ten minutes.)

And thereupon the defendant, to sustain the issues in its behalf, offered the following evidence:

Mr. Hocker: Will you mark that Defendant's Exhibit No. 1, please?

(A large drawing, purporting to be a plat of the NYC & St. L. RR Fort Wayne, Indiana, West Wayne yard, was thereupon marked by the reporter as Defendant's Exhibit No. 1.)

Mr. Hocker: I wish to offer in evidence, your Honor, Defendant's Exhibit No. 1, which is a plat.

[fol. 113] The Court: Very well, Defendant's Exhibit No. 1. It will be received.

Mr. Hocker: Which is a plat of the yards at Fort Wayne. Mr. Eagleton has seen it and agreed it is okay.

Note:

Defendant's Exhibit No. 1
(Page 85) is located on Card 3.



[fol. 115] Mr. Hocker: I will set it up here, Mr. Eagleton, so the jury can see it. The extension of the track was not brought all the way down, because the accident occurred in the west end of the yard.

Mr. Eagleton: That is this end (indicating) is west, isn't it?

Mr. Hocker: That is right. North, the top, here is the east end, here is the west end (indicating). The lines at the bottom show the elevation of the eastbound main, and three lines—the top line is the elevation 780, and the bottom line is 760, and the middle line is 770. And the fourth line, which is not exactly parallel throughout, at least is the elevation of the eastbound main. It appears about 766 at this end and about 766 or 767 at the west end of the roundhouse, and from there up to about 773. Is that approximately right, Mr. Eagleton?

Mr. Eagleton: I am not [goog] enough at these maps to know what you are doing, but this last figure up here is 800. Does that mean anything?

Mr. Hocker: Well, the bottom figures that appear along the bottom of the elevation part show the distance in feet from the spot where Affolder was injured, and the vertical figures show the elevation above sea level.

Mr. Eagleton: And 780, 770—

Mr. Hocker: 760.

[fol. 116] Mr. Eagleton: Is that 760 there?

Mr. Hocker: Yes. That would be about 773 at the extreme left end of the yard, which is the distance a thousand feet west of the point west of where Affolder was injured. As I recall, his testimony was—

Mr. Eagleton: Opposite 14, No. 14 switch.

Mr. Hocker: Opposite 14 track switch, that is right. This is 14 track switch here (indicating).

Mr. Eagleton: Why not mark that with an X, so we won't have to find it again?

Mr. Hocker: This is 14 track, and 14 track switch here, and the approximate place where he described he fell was on the south side of the eastbound main.

Mr. Eagleton: That is right.

Mr. Hocker: That would be about here, is that right, where I put the X?

Mr. Eagleton: I assume that you know. Well, I don't know it, but I assume whatever you say is right.

Mr. Hocker: This is the eastbound main, which is here (indicating); he was south of the eastbound main about opposite the 14 track switch. The repair here, the repair track that runs off the eastbound main was where the engine was working, the crossover appears considerably west, and the eastbound main runs down to the ridge, which is not shown, but which is some 1700 feet from the place [fol. 117] where he was injured.

Now, would you ladies and gentlemen like to study that, or shall we go on? If anybody wants to look at that more carefully, why, you may. I think that is the situation.

Mark these.

(Four photographs were thereupon marked by the reporter as Defendant's Exhibits Nos. 2, 3, 4, and 5, respectively.)

Mr. Hocker: I now wish to offer in evidence, your Honor, Defendant's Exhibits Nos. 2, 3, 4, and 5.



Def Exp 2

Floyd O. Affolder case. Accident in West Wayne Yards Ft. Wayne Ind.
photo taken Sept. 26.1947.
"D" end and top of tank inland car #156267

NEUMAN STUD

Defendant's Exhibit No. 2

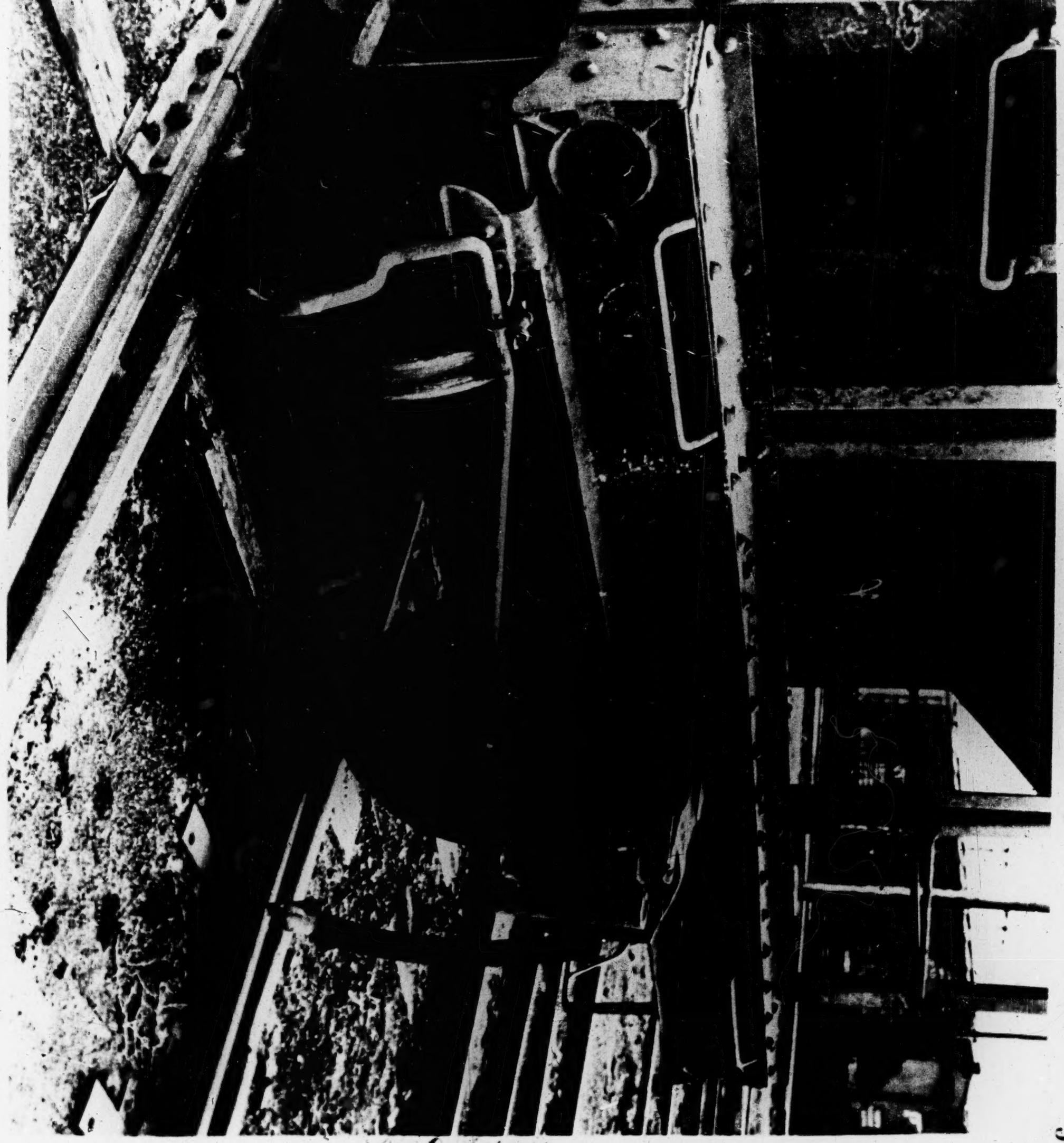
89



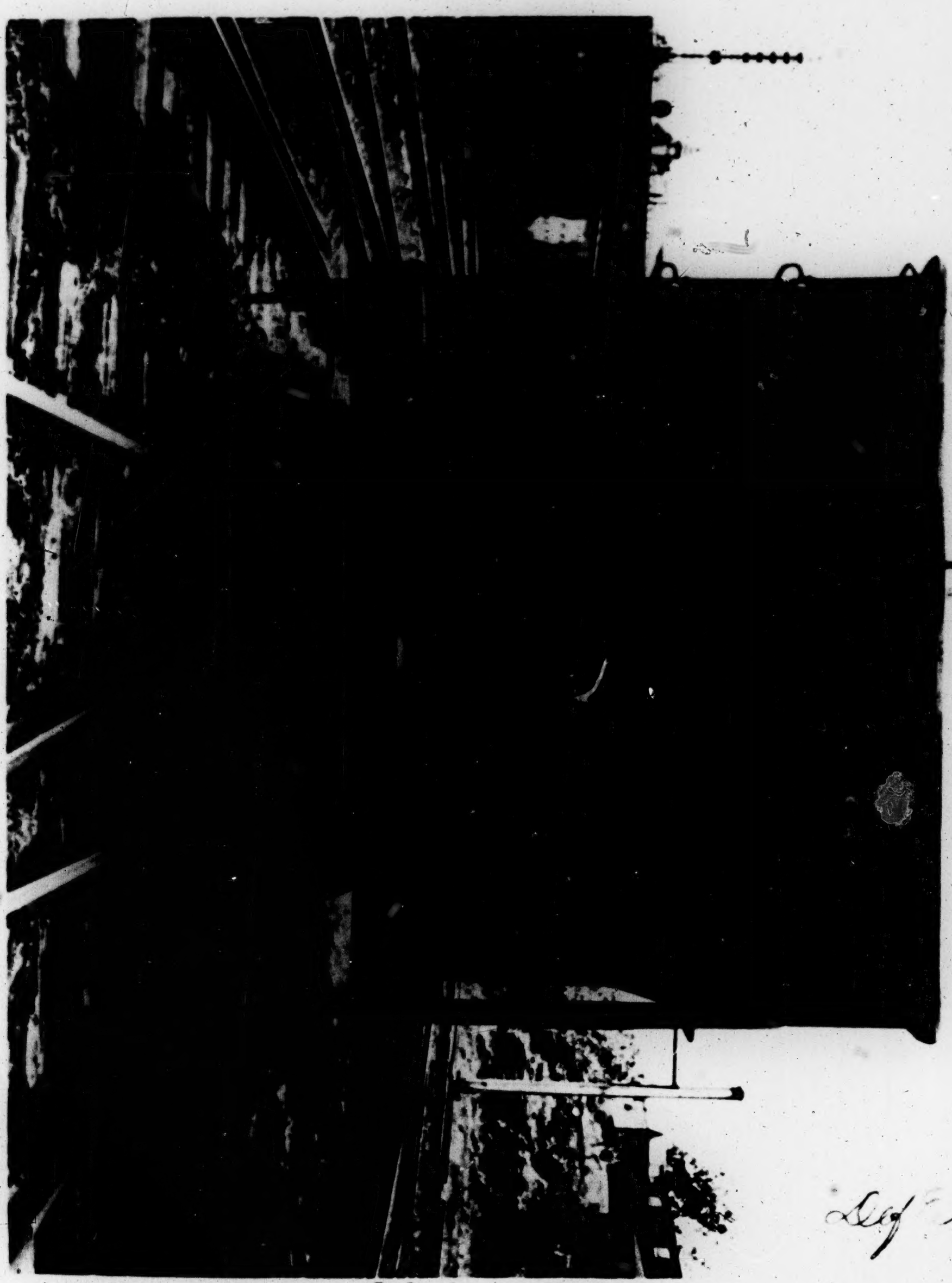
NEUMAN STUDIO

91

Defendant's Exhibit No. 3



Defendant's Exhibit No. 4



Defendant's Exhibit No. 5

Def 45

[fol. 122] Mr. Hocker: Exhibits 2 and 3 are photographs of the Rock Island car involved in this accident—Exhibit No. 2 showing the B end of the car, that is the brake end of the car.

Would you like to look at that and pass it, please, sir (addressing a juror)?

Exhibit No. 3 being a photograph of the same car, the Rock Island car, showing the Norfolk & Western car attached to it in the background, showing the A end of the car.

Those pictures were taken two days, I think, prior to the accident.

Mr. Eagleton: Following the accident, you mean.

Mr. Hocker: Or following the accident. September 26th.

Exhibits 4 and 5 are photographs of the Pennsylvania car, Exhibit 4 being the A end of the car, a closeup of the coupler mechanism, and Exhibit 5 being the B end of the car. These photographs were taken May 22, 1948, in Philadelphia, not in the Fort Wayne yards at all.

(Thereupon, at the request of Mr. Hocker, a photograph was marked by the reporter as Defendant's Exhibit No. 6.)

Mr. Hocker: I now wish to offer in evidence Defendant's Exhibit No. 6, also taken a few days after the [fol. 123] accident, being the A end of the Norfolk & Western car next to the Rock Island, and showing the power brake on the N&W, which has been referred to as an Ajax brake in the testimony.



Floyd G. Arfolder case. Accident in West Wayne Yards Ft. Wayne Ind.
photo taken September 26, 1947.

" B " end and side of N & W Hopper car # 74051

NEUMAN STUDIO
Commercial - Aerial - Legal - Illustrati

26

Defendant's Exhibit No. 6



[fol. 125] GEORGE B. SEIMIK,
a witness of lawful age, being duly produced, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Hocker:

Q. Please state your name. A. George B. Seimik.

Q. Where do you live, Mr. Seimik?

A. 2308 East Hartford Street, Huntington, Indiana.

Q. And by whom are you employed?

A. Nickel Plate Railroad.

Q. And in what capacity are you employed?

A. Car inspector.

Q. Were you employed as a car inspector on the Nickel Plate in September, of last year? A. Yes.

Q. And in what yard did you work?

A. Same yard. West yard.

Q. West Fort Wayne yard? A. Yes.

Q. I will show you what has been marked Plaintiff's Exhibit A, and ask you if you recognize that card.

A. What?

Q. Can you recognize that card? A. Yes.

[fol. 126] Q. What is it? A. PRR.

Q. Well, is it a bad-order card? A. Yes.

Q. And is your signature on that card anywhere? A. Yes.

Q. The words "George Seimik" are your signature, is that it? A. Yes.

Q. Now, will you tell me what you bad-ordered that car for? A. I bad-ordered that car for repack.

Q. For what? A. For repack boxes.

Q. For repack boxes. Well, what does that mean, Mr. Seimik?

A. That means boxes got to be repacked every fifteen months.

Q. Now, when you say boxes, you mean the journal bearing boxes?

A. The journal bearings taken out, and got to put new —examine bearings and your packing, new packing put in.

Q. Now, is that the only defect for which you bad-ordered that car? A. That is all. That is all I see.

Q. Well, is that the only one that you entered on the card? A. Yes.

Q. Now look on the back of that card, Mr. Seimik. Did you put the writing that appears on the back of that card [fol. 127] on there? A. No.

Q. How is that card put on the car?

A. Put on like this (indicating).

Q. Well, do you tack it on?

A. Tack it with two tacks.

Q. Tack it on with two tacks? A. Yes.

Q. Is it your job, or is it any part of your duties to make an entry of what repairs should be made or what repairs are made?

A. Well, my job to put that car on the repair track.

Q. Well, is it any part of your job to make entries on the back side of that card? A. No; that ain't my job.

Q. You make only the entries on the face?

A. On the face.

Mr. Hocker: You may inquire.

Mr. Eagleton: No questions.

The Court: You are excused.

Mr. Hocker: Step down, Mr. Seimik. Much obliged.

[fol. 128] WAYNE A. WALBURN,

was called as a witness for the defendant, asked to raise his hand and be sworn, and upon hearing the oath administered, made this reply:

"I would rather use the word 'affirm', please."

The Court: Do you solemnly affirm that the testimony you give in this case shall be the truth, the whole truth, and nothing but the truth?

The Witness: That is right.

Mr. Hocker: Take the stand here, please, sir.

WAYNE A. WALBURN,
being duly affirmed, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Hocker:

Q. Will you please state your name?
A. Wayne A. Walburn.
Q. Where do you live, Mr. Walburn?
A. 1405 High Street, Fort Wayne, Indiana.
Q. And what is your occupation, Mr. Walburn?
A. Car checker.
Q. By whom are you employed?
A. Nickel Plate Railroad.
Q. Were you employed as a car checker in September, last year? A. That is right.
[fol. 129] Q. And where did you work at that time?
A. In the repair track.
Q. In what yard? A. West yard.
Q. At Fort Wayne? A. Yes.
Q. Now, what are a car checker's duties, Mr. Walburn?
A. To—after the cars are set on the repair track, are to check around the car, complete car, and whatever is wrong with the car, we mark it on the work sheet.
Q. I will show you what has been marked Plaintiff's Exhibit A and ask you if you can recognize that card.
A. Yes.
Q. Now, does that pertain to the Pennsylvania car, Pennsylvania 727512? A. Yes, sir.
Q. Does that contain your signature or your initials?
A. Yes, sir.
Q. And what part of the card are your initials on?
A. In okaying the card.
Q. Now, when did you first see that car, Mr. Walburn?
A. After it was set on the repair track.
Q. And what time of day?
A. 7:00 o'clock in the morning. Of course, the mark 6:00 a. m. here is railroad time. That would be 6:00
[fol. 130] o'clock railroad time.
Q. 6:00 o'clock railroad time of what day? A. 9-24-47.
Q. September 24th. And did you inspect the car, or

check your car—which do you say—do you say inspect it or check it? A. Check it.

Q. And what did you find wrong with the car when you checked it, if anything?

A. BL operating lever bracket bent. BL one side grab iron bent.

Q. Now, BL means the brake end on left side, is that right? A. That is right.

Q. Was there anything else to be done to that car on the repair track? A. Not on this repair job.

Q. Who made the entry on the—well, before I get to that, does that remark, BL operating lever bracket bent, BL grab iron bent, does that appear on the bad-order side of the bad-order card or on the repair side?

A. That is on the repair side.

Q. Now, is that repair side visible to anyone looking at the bad-order card while it is tacked on the car? A. No. [fol. 131] Q. Why not, Mr. Walburn?

A. Well, in bad-ordering the car, that has nothing on the bad-order card here, and it is shown here he found the repack date was overdue.

The Court: Would you speak a little louder?

The Witness: In starting to—when he inspected, Mr. Seimik was inspecting the car, he finds that the car, the repack date was overdue, so he bad-orders it for a repack job, that is as far as he went, and put this tag on it.

Q. All right. Now, does the inspector, the inspector in the yards that inspects the cars as soon as they come in on the train, does he have anything to do with marking anything on the back, the record of repairs on the back of the bad-order cards? A. No, sir.

Q. That is not his function? A. No, sir.

Q. Whose job is it to make the notation on the back of the bad-order card? A. Car checker. Myself.

Q. Who takes that bad-order card off the—what do you call that board—the commodity board?

A. Yes. I take it off of the—after I check around the [fol. 132] car, I take it off of the car and write what is wrong with the car on there.

Q. Now, what is the purpose of your writing what is wrong with the car on the back of the card?

A. So that when the repairmen come along to repair the car, they read on here what I have wrote on here, then they know what to repair.

Q. All right. Now, there is another initial on there, "EHB." Can you tell me whose initials those are?

A. Yes, sir. Mr. Becker's.

Q. Mr. E-r— A. Mr. Ernie H. Becker.

Q. What is his business?

A. He is assistant car foreman.

Q. Let me show you a card that has been marked Plaintiff's Exhibit B, and see if you can tell me—can you recognize that card? Does that pertain to the Rock Island car 156067? A. Yes.

Q. Now, can you tell me whether or not your initials appear on that card? A. Yes.

Q. Did you make out the entries that appear on the repair side, the side marked "Record of Repairs" on that [fol. 133] card? A. Yes.

Q. Are there any markings on the bad-order face of that card? A. No.

Q. Can you tell us whether that card was on the car when it came into the repair track?

A. The evidence here shows that it was not, because up here at the top I marked it not bad order. That is the way we do when there isn't any bad order card on the car when it comes to the repair track.

Q. There was no card on the car when it came to the repair track?

A. That is what this information shows, not bad order.

Q. Now, the words are "Not B O", is that right?

A. That is right.

Q. What does that stand for? A. Not bad-ordered.

Q. When you say bad-ordered, you mean that a card had been tacked on it, is that what bad-ordered means?

A. That is right.

Q. And this one had not been bad-ordered?

A. That is right.

Q. Now, were there any defects apparent in the car when you examined it? A. Examine brass L4.

[fol. 134] Q. Examine the brass, is that what "Ex Brass" means? A. That is right.

Q. And what does "L4" mean?

A. That is the location. It says R1, 2, 3, and 4; L1, 2, 3, and 4.

Q. That is right, the first, the second, the third, and the fourth wheel? A. That is right.

Q. The journal. That is left 1, 2, 3, and 4?

A. That is right.

Q. This was the left 4? A. That is right.

Q. Now, did you make any—did you find anything else wrong with that car? A. Not on this repair card.

Mr. Hocker: I believe that is all.

Mr. Eagleton: That is all.

[fol. 135] RICHARD K. MILLIKAN,

a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Hocker:

Q. Will you state your name, please?

A. Richard K. Millikan.

Q. Where do you live, Mr. Millikan?

A. 2506 Pleasant Avenue, Fort Wayne, Indiana.

Q. What is your occupation? A. Yard foreman.

Q. For the Nickel Plate?

A. For the Nickel Plate Railroad, Fort Wayne division.

Q. Were you the yard foreman in charge of the crew when Floyd Affolder was injured? A. Yes, sir.

Q. Following the accident, did you look at the couplers of the two cars where the separation occurred, the Rock Island and the Pennsylvania hopper? A. Not immediately.

Q. How long after? A. Approximately an hour.

Q. An hour afterwards? A. Approximately that, sir.

Q. Had the cars been moved in the meantime?

[fol. 136] A. No, sir.

Q. Had the knuckle on the Pennsylvania hopper been closed? A. Closed.

Q. Was the pin locked at that time?

A. I believe it was, sir.

Q. Who decided that the Rock Island box car should go to the repair track? A. I did.

Q. Do you have authority to put a bad-order card on a car? A. No, sir, I do not.

Q. Did you put a bad-order card on this car? A. No, sir.

Q. But you did set it on the repair track? A. Yes, sir.

Q. What was the reason that you decided this car should be set on the repair track?

A. The car was loaded with meal, and it more than likely, in switching movement, it had bulged the door or it had been jarred around so as to bulge the door approximately a foot from the side of it.

Q. The load had shifted and the door was bulged out?

A. That is right.

Mr. Hocker: You may inquire.

Cross-Examination

[fol. 137] By Mr. Eagleton:

Q. Mr. Millikan, between the time that you examined the knuckle at the east end of the Pennsylvania hopper car and the time that car was originally kicked down the track for the purpose of making an automatic coupling onto the Rock Island car, when it was originally kicked down there had been several subsequent movements of that car, isn't that right?

Mr. Hocker: I think this is not within the scope of the direct examination, your Honor, and I object on that account.

The Court: Well, it is on the borderline. I will let him answer it.

A. To tell you the truth, I don't quite understand your question.

Q. Well, maybe I didn't make myself clear. From the time that that car was originally kicked down as the twenty-sixth car on the eastbound main, to couple onto the west end of the Rock Island car—I am speaking now of the twenty-sixth car as being the Pennsylvania hopper—from that time on until you looked at it after the accident, there had been several other movements in on that track and against that car? A. No, sir.

Q. Well, as a matter of fact, wasn't there—this car went [fol. 138] down originally as the twenty-sixth car, didn't it? A. Yes, sir.

Q. Well, weren't there some subsequent movements for the twenty-seventh and the twenty-eighth cars kicked into that car later? A. Not after the accident.

Q. No, that is what I am trying to get clear. I said between the time that car, the twenty-sixth car, was originally sent down that track, the eastbound main, for the purpose of coupling onto the west end of that Rock Island car, and the time you saw it after the accident, between those two times, there had been movements of that Pennsylvania car and movements against that Pennsylvania car, is that right? A. Yes, sir.

Q. There had been kicking movements against its west end, which would have the tendency to kick it forward, isn't that right? A. Yes, sir.

Q. Push it to the east? A. Yes, sir.

Q. And there would be at least two kicking movements, wouldn't there, before you came to the shove, isn't that right? A. I believe so, sir.

[fol. 139] Q. So that before you saw that knuckle after the accident and after the time now—and between the time it originally went down, there were at least two kicking movements and a shoving movement, isn't that right? A. Yes, sir.

Q. Now, assume, from your experience, that a knuckle, a coupling fails to make, it just doesn't make, you have got a knuckle open then in a position to make and it just doesn't make—do you understand what I mean?

The Court: Do you mean by the term "doesn't make," it doesn't couple?

Mr. Eagleton: Couple. In other words, by the term "make", I mean that when it makes, it couples. When it doesn't make, it fails to couple. Is that right?

The Witness: Yes, sir.

Q. Now, assuming you have got a knuckle on the east end of that hopper car, Pennsylvania hopper car, open, then if it does against anything down on that track, it should make, or should couple, is that right?

Mr. Hocker: Just a minute. Just a minute. This is clearly outside the scope of the direct examination, your Honor. I object to it on that ground.

The Court: Yes, I will sustain the objection on that. I [fol. 140] let you go on the other, on the theory you said he had been down there to see. But I think this is going beyond that. Objection sustained.

Mr. Eagleton: Pardon me, please.

(Here Mr. Eagleton addresses the Court, off the record and out of the hearing of the jury.)

Q. You are still employed by the Nickel Plate?
A. Yes, sir.
Q. Brought down here by the Nickel Plate? A. Yes, sir.
Q. You were the foreman that night that accident occurred? A. Yes, sir.
Q. What the condition of the knuckle was at the time it was sent down there originally by Tielker, you don't know, do you?

Mr. Hocker: I think that is beyond also—I have no objection to his answering it, but I don't wish to waive the point though or to pass that rule aside in that manner.

The Court: Objection overruled.

Q. You don't know what its condition was when Tielker sent it on down there, do you? A. No, sir.

Mr. Eagleton: Your Honor, I will say I am not going to examine him about any further defect in that, [fol. 141] that was not gone into on direct.

The Court: Not on cross-examination.

Mr. Eagleton: Yes, sir.

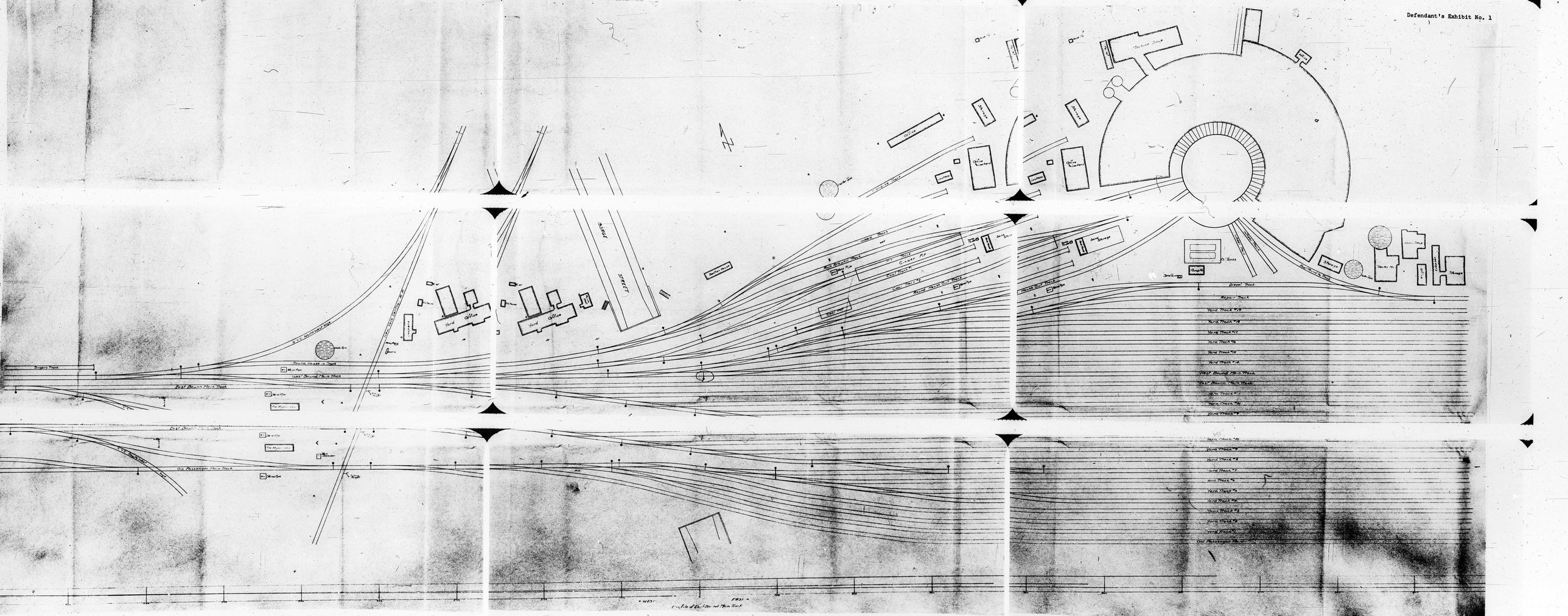
The Court: You may call him as your witness, if you wish. Anything further of this witness?

Mr. Eagleton: You mean now, I may do that now?

The Court: Now. Both finished?

Mr. Eagleton: The plaintiff will then use him as plaintiff's own witness, do that quick

Defendant's Exhibit No. 1


Roundhouse
Office
Office
Coaling Station
Yard Office
Yard Office
Roundhouse
Roundhouse
Coaling Station
Roundhouse
Coaling Station
Roundhouse
Coaling Station

Mr. Hocker: Well, your Honor, his case is closed. He can reopen his case.

The Court: You may do it in rebuttal.

Mr. Eagleton: All right.

The Court: You (addressing the witness) are excused for the time being, but you are not finally excused.

Mr. Hocker: Step down, Mr. Millikan. Thank you.

[fol. 142] ERNEST H. BECKER,
a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Hocker:

Q. Will you please state your name?
A. Ernest H. Becker.
Q. Where do you live, Mr. Becker?
A. 6217 Fourth Street, Fort Wayne, Indiana.
Q. And by whom are you employed?
A. Nickel Plate Railroad.
Q. What is your occupation—I mean, what is the type of your employment, what is your title?
A. My title is assistant general car foreman.
Q. Was that your occupation last September?
A. That is right.
Q. And you work in what yard?
A. West Fort Wayne yard.
Q. And do you remember the morning which Floyd Affolder was injured? A. Yes.

Mr. Hocker: Please mark these Defendant's Exhibit No. 7 and Defendant's Exhibit No. 8.

Form CSA-A 111. 5-41

NICKEL PLATE ROAD

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

REPORT OF INSPECTION OF FREIGHT CAR

REPORT OF INSPECTION OF FREIGHT CAR N-W - 74051 (Initials and number) AFTER PERSONAL INJURY

TO Floyd L. Affolder AT West Wayne Jct. (Name) Ft Wayne (Station)

on the 24 (Date) day of Sept 1947 at [illegible] M.

Parts of car inspected all parts left

INSPECTED AT Ft Wayne on the 24 day of Sept 1947 at 6 3/4 M.

ANSWER THESE QUESTIONS IN ALL CASES

Is "B" end of car North, South, East or West?

KIND of car Hopper Loaded or empty empty

IF LOADED, state condition of lading, and whether or not any part of car or lading extends farther than it should beyond end or side of car

IS CAR marked or carded "Bad Order"? yes If so, say how and give location marks or cards bad order card on B end at time of inspection for repair & found car off center on A end on account of [illegible] end sill

END-SILL PLATFORMS: (Width and condition) A-end B-end

BUFFERS: On end-sills or head blocks? on end sill Height 3'5" (To centers) in.

COUPLERS: Kind and Condition: A-end metal good order B-end

Kind and Condition: A-end AAR E 6 1/4 X 8" E Height 3 3 1/2 in. B-end AAR E 6 1/4 X 8 E Height 3 3 1/2 in.

Gauge between knuckle-lugs and guard arm A-end 4 7/8 in. B-end 4 1/8 in.

Lateral or side play: A-end 3" in. B-end 3 in.

COUPLING-LEVERS—CHAINS: Were couplers and levers tested by operating? yes

Condition: A-end good order B-end good order

HEAD BLOCKS, CARRIER IRONS and other parts not mentioned: (Condition) A-end good order B-end good order

REMARKS:

NICKEL PLATE ROAD OFFICE OF SEP 27 1947 CHIEF CLAIM

HAND BRAKES: (Condition) Test by setting and releasing? good order

BRAKE-PLATFORM: Height, dimension, condition 8' 3" - 7/16 X 11 X 5'3" - good order

AIR BRAKES: Condition: good order

When was triple and cylinder last cleaned, oiled & tested? WLE 9-12-46 - DX

AIR HOSE: Condition: A-end good order B-end good order

Date of manufacture: A-end 10-45 B-end 7-46

REMARKS:

LADDERS, GRAB IRONS, HAND-HOLDS, SILL-STEPS—Were all tested? good order

LADDERS: On sides or ends? sides & ends Bl-BR, AL or AR? BZ - AR

Top of roll to bottom round 41" in. Rest edge to roof grab-iron in.

Condition: A-end good order B-end good order

GRAB-IRONS, HAND-HOLDS: State location, condition and fastening (see back of blank): AR- BZ - AR - AL good order - bolted & riveted

SILL-STEPS: Location and condition AR-BZ-AR-AL Height from top of rail 24" in.

REMARKS:

ROOF AND RUNNING BOARD: Wood or metal outer covering? Condition:

Were all boards in place and properly fastened?

Were there any nails, cleats, splinters or any other objects projecting?

DOOR: Side-doors, end-doors, trap-doors, end-doors; state kind, location and condition: drop doors - metal - A/B good order

REMARKS: Car set off center on "B" end west end of car at time of inspection 6 3/4 9-24-47

Signed at on the day of 19

CORRECT: F L Essig Foreman. E H Becker Inspector.

(See other side)

Defts Ex # 7

109

Defendant's Exhibit No. 7

Form CCA-8. 12M. 8-46.

NICKEL PLATE ROAD

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

REPORT OF INSPECTION OF FREIGHT CAR

REPORT OF INSPECTION OF FREIGHT CAR RI- 156067 (Initial and number) AFTER PERSONAL INJURY

TO Floyd L. Affolder (Name) AT West Wayne Jct. Ft Wayne Ind (Place)

on the 24th day of Sept. 1947 at M.

Parts of car inspected all parts

INSPECTED AT Ft Wayne on the 24 day of Sept. 1947 at 6 30 M.

ANSWER THESE QUESTIONS IN ALL CASES

Is "B" end of car North, South, East or West?

KIND of car Box Loaded or empty load

IF LOADED, state condition of lading, and whether or not any part of car or lading extends farther than it should beyond end or side of car load shifted out of doorway on R side - 16"

IS CAR marked or carded "Bad Order"? yes If so, say how and give location marks or cards Bad order cards on Chgo R- Side at time of inspection

END-SILL PLATFORMS: (Width and condition) A-end B-end

BUFFERS: On end-sills or head blocks? on end sill Height 35 in. (To centers)

COUPLERS: Kind and Condition: A-end good order B-end

Kind and Condition: A-end RAR 6X8 " Height 32 1/2 in.

B-end ARA 6X8 Height 33 in.

Gauge between knuckle-lugs and guard arm A-end 5" in. B-end 5" in.

Lateral or side play: A-end 3 1/2 in. B-end 3 1/2 in.

COUPLING-LEVERS—CHAINS: Were couplers and levers tested by operating? yes

Condition: A-end good order B-end good order

HEAD BLOCKS, CENTER SILLS AND OTHER IRONS (Condition): A-end good order B-end

NICKEL PLATE ROAD OFFICE OF SEP 27 1947 CHIEF CLAIM AGENT

REMARKS:

HAND BRAKES: (Condition) Test applying and releasing? good order

BRAKE-PLATFORM: Height, dimension, condition 10' 8" - 1 3/4 X 10 1/2 X 30" - good order

AIR BRAKES: Condition: good order

When was triple and cylinder last cleaned, oiled & tested? G J E 4-21-47 J

AIR HOSE: Condition: A-end good order B-end good order

Date of manufacture: A-end 10-41 B-end 9-46

REMARKS:

LADDERS, GRAB IRONS, HAND-HOLDS, SILL-STEPS—Were all tested? good order

LADDERS: On sides or ends? sides & ends BL, BR, AL, or AR BR-BZ-AR-AZ

Top of rail to bottom round 40" in. Rail edge to rail grabiron 10 1/2" in.

Condition: A-end good order B-end good order

GRAB-IRONS, HAND-HOLDS: State location, condition, and fastening (see back of blank):

BR-BZ-AR-AZ good order - bolted & riveted

SILL-STEPS: Location and condition BR-BZ & AR-AZ

Height from top of rail 21" in.

REMARKS:

ROOF AND RUNNING BOARD: Wood or metal outer covering? wood - Metal Condition: good order

Were all boards in place and properly fastened? good order

Were there any nails, cleats, splinters or any other objects projecting? good order

DOOR: Side-doors, roof-doors, trap-doors, end-doors; state kind, location and condition: side doors - wood RZ - good order bad order

REMARKS: Car

Signed at on the day of 19

CORRECT: F L Essig Foreman. E H Buchsa Inspector.

(See other side)

Def Ex 8

Defendant's Exhibit No. 8

111

WILLIAM J. METZGER,
a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Hocker:

Q. Will you please state your name?
A. William J. Metzger.
Q. Where do you live, Mr. Metzger?
A. I live in Cleveland, Ohio.
Q. And what is your occupation, Mr. Metzger?
A. Mechanical engineer, particularly coupler development engineer, for the National Malleable & Steel Casting Company.
Q. Where is the National Malleable & Steel Casting Company located, where is the office?
[fol. 161] A. Their general offices are located in Cleveland, Ohio.
Q. And does that company engage in the manufacture of couplers for railroad cars? A. Yes, sir.
Q. How long have you been employed by the National Malleable & Steel Casting Company? A. Since 1910.
Q. How long have you been engaged particularly in the design and construction of couplers for railroad cars?
A. May, 1912, to 1919, and then I was made chief draftsman, or assistant chief, then chief draftsman, then from 1928 up to the present time, inclusive, on coupler design.
Q. Have you been engaged in the developmental work of couplers, development of improvements of couplers during the years? A. Yes; since 1912, intermittently.
Q. Are you familiar with what is known as a type E coupler, Mr. Metzger? A. Yes, I am very familiar with it.
Q. Can you tell me whether you had anything to do with the designing of that coupler yourself?
A. Yes. I made the—I worked up the design of the inventor, who was Mr. Bazeley.
Q. I show you two photographs, Defendant's Exhibit 5 [fol. 162] and Exhibit 4, and ask you if those are photographs of a car equipped with a type E coupler?
A. Yes. Those are—that is a type E coupler known as a rotary bottom-operated type.
Q. Now, as I understand it, you can set up these cou-

plers, the type E coupler, to operate from the top or the bottom? A. That is correct.

Q. And this particular coupler was set up to operate from the bottom, is that right? A. That is right.

Q. At my request, did you prepare a model as near similar as might be to the type E coupler bottom rotary operated as you have described this one involved in the Pennsylvania car we have been speaking of? A. Yes, sir.

Q. I will show you this model. Is that the model that you prepared and brought here, Mr. Metzger? A. Yes, sir.

Q. Is that model in all respects save size the duplicate of the type E coupler which has been described as being on this Pennsylvania car? A. Yes, sir.

Q. I wish you would dismantle that coupler and explain [fol. 163] to the jury the operation of the coupler, the parts of it, so that they will have an understanding of how it operates. A. Yes, sir.

Mr. Hocker: I would suggest, your Honor please, if it is proper, to take that over to the jury box. It is small and it might be easier for them to understand.

Mr. Eagleton: I think you would probably get just as good vision from your elevation there, and we could all see it at the same time. I mean you get down here, it will be difficult for all of us to follow, although I am not making any suggestion. The Court can rule on it any way he wants. I thought the elevated position might be better, if the Court please.

Mr. Hocker: I think, your Honor, it would be a good more understandable, it being a small model.

The Court: I would suggest, when you get to where you are ready to explain, you stand here at the corner, so counsel can see. Can you stand there?

The Witness: Yes, sir. At this particular corner, your Honor?

(The witness stands at the corner of the jury box.)

The Witness: Why, type E consists of—mainly of the coupler body. This (indicating) is what we term as [fol. 164] knuckle thrower. The function of the knuckle thrower is to push the knuckle out to the open position. I will explain that for you a little later.

[fol. 145] Mr. Eagleton: I haven't any objection to the Rock Island, but I don't know what the Norfolk & Western has to do with it. There is no evidence here it has anything to do with it.

Mr. Hocker: I just wanted to show it to you, Mr. Eagleton. The time is not ripe, I guess.

Q. I show you what has been marked Defendant's Exhibit No. 8, and ask you if you recognize that.

The Court: Do you have a 7?

Mr. Hocker: 8, that is, your Honor.

The Court: I say, do you have a 7?

Mr. Hocker: Yes, I do have a 7.

The Court: You have one coming?

Mr. Hocker: Yes, sir, I have one coming.

Q. Do you recognize that, Mr. Becker? A. Yes.
Q. What is that, please?
A. Well, that is my report of inspection of a freight car.
Q. What car? A. It is Rock Island 156067.
Q. Now, when was that inspection made?
A. On the 24th day of September, 1947.
[fol. 146] Q. At what time? A. 6:30 a. m.
Q. And who made it? A. Mr. Walburn, and myself.
Q. Mr. Walburn and yourself? A. Yes.
Q. And was Mr. Essig—did he assist in that inspection?
A. No.
Q. All right. What was the occasion of your making an inspection of that car that morning?
A. Well, our instructions are, if we have any personal injury about any freight equipment or any equipment, we aim to make out one of these inspection forms.
Q. In other words, you had heard, had you, that there had been an accident? A. Yes.
Q. In connection with this car and another car? A. Yes.
Q. What was the other car that you understood there had been an accident, the accident involved?
A. Well, if I remember right, I think it was a N & W hopper.
Q. I will show you what has been marked defendant's

Then the knuckle which is used to lock the two opposing couplers together and the lock which is used to lock the knuckle in the closed position, and this is what we call the rotary lock lifter lever. That is how you actuate the lock to the unlocked position.

Now, briefly, the principle of the coupler is this: you see the lock in this particular plane as we are looking at the coupler, as you are looking at it the mechanism is in this particular plane here (indicating). Now, when—this is the fulcrum point, this is the fulcrum, and that raises, as the operating rod is brought upward, it is on a cross-over, as you raise it, it rotates this upward, and that lifts the lock to the unlocked position. When it reaches a point that far, there is a fulcrum in the front here, brings that lock back and pushes against the knuckle thrower and pushes the knuckle out to a so-called "open position."

Now, that can be illustrated, see, as you lift that lock up, this is the knuckle thrower that kicks that knuckle thrower out, and as that kicks out, it rotates the knuckle to the open position. Perhaps you can see that.

[fol. 165] As you lift that lock, this end engages the knuckle, and that rotates as you lift, we see that rotate the knuckle to the open position.

Q. Now, when you release the lock from the bottom, what happens to the lock, or do I anticipate, maybe?

A. That, now—the coupler being in the locked position, the first thing as you lift the lock, you disengage—this coupler is locked now, and as you lift this lock, you raise it beyond the top of the so-called "knuckle tail," is what we term the "knuckle tail." That fully unlocks the coupler, and then by further exertion on the lock causes that knuckle to rotate to the fully open position.

Now, then, of course, after the coupler is prepared in this manner, just simply engaging an opposing coupler will cause that coupler to lock and drop and engage it, and to couple automatically.

Q. Thank you, Mr. Metzger. Will you resume the stand, please?

(The witness resumes the stand and puts the model back together.)

Q. How was the design of that coupler arrived at, Mr. Metzger?

Exhibit No. 7, Mr. Becker, and ask you if that is the inspection record with respect to the N & W hopper.

[fol. 147] A. Yes.

Q. Those are the two cars that you examined that morning? A. Mr. Walburn and myself, yes.

Q. Did you examine a Pennsylvania hopper that morning? A. No, I did not examine any Pennsylvania hopper.

Q. Your understanding was that these were the two cars that were involved in the accident, is that it?

A. That is right.

Q. You had no knowledge of your own concerning the accident? A. No.

Q. Now, will you please, refreshing your recollection, if you care to, from Exhibit No. 8, which refers to the Rock Island car, tell the jury whether you found any defects with respect to the coupler of the Rock Island car.

(The witness examines the said exhibit.)

A. The report showed, after the inspection was made, that the car was mechanically okay, so far as couplers are concerned.

Q. That is, the couplers operated? A. Yes.

Q. Properly? A. Yes.

Mr. Hocker: I believe that is all.

Mr. Eagleton: That is all.

The Court: You are excused.

[fol. 148] FORREST L. ESSIG,

a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct Examination

By Mr. Hocker:

Q. Please state your name. A. Forrest L. Essig.

Q. And where do you reside, Mr. Essig?

A. 1528 Melrose Avenue, Fort Wayne, Indiana.

Q. And what is your occupation?

A. General car foreman for the Nickel Plate Railroad.

Q. Were you in that position last September, 1947?

A. I was.

Q. And where were you working, what yard?

A. West Wayne yard, Fort Wayne, Indiana.

Q. All right. Now, in your capacity as general car foreman, is it your—what are your duties with respect to inspection of cars following accidents involving personal injuries?

A. We are required to make this inspection—we refer to it as a CCA-9—a report of an inspection of the various parts of the car.

Q. Well, I will show you—let me interrupt you there—show you what has been marked Defendant's Exhibits Nos. 7 and 8, and ask you if those are the reports, CCA-9, that [fol. 149] you refer to. A. They are.

Q. Were those reports made on the morning of September 24th? A. Yes, sir.

Q. And what was the occasion for making those inspections?

A. We were advised Mr. Affolder had been injured on these two cars.

Q. Did you have any other information at that time than that he had been injured on those two cars? A. No, sir.

Q. Did you know at that time, had any claim been made of any particular defect with respect to any of these cars?

A. No, sir.

Q. Now, with reference to your inspection of—did you assist in this inspection yourself? A. I did not.

Q. What is the—who made the inspection?

A. Mr. Becker—Mr. E. H. Becker and Mr. Walburn.

Q. Now, does that—was that inspection made under your supervision?

A. That is right. I signed it as the general foreman in charge.

Q. But you did not make the inspection yourself?

A. I did not assist in the inspection.

[fol. 150] Mr. Hocker: I believe that is all.

Mr. Eagleton: That is all.

The Court: You are excused.

A. The design is basically the design of the type, so-called "type D coupler," which was the forerunner of the type A coupler. That particular coupler was adopted as [fol. 166] standard by the railroads in 1916, and is a result of the service experience obtained during the time from 1916 up until 1930—1931. The further improvements were made in the type E coupler, and it succeeded the type D coupler in March, on March 1, 1932, submitted to a letter ballot in 1931, and was made standard effective as of March 1, 1932.

Q. What do you mean by submitted to a letter ballot?

A. Why, after the coupler has been designed, it is submitted in conjunction with the coupler committee of the American Association of Railroads, and has passed the physical tests in the laboratory and service tests on the road, it is advanced to an alternate standard, and after a probation period in service, it is then submitted to the members of the railroads, their agents, by letter ballot for adoption or advancement to the standard.

Now, this letter ballot was sent out to all the railroads in 1931, and it was practically unanimously accepted as standard as of March 1, 1932.

Q. Are there other manufacturers of couplers who make this type of coupler, besides National Malleable?

A. Yes. There are four other manufacturers in the field. There is the Buckeye, American Steel Foundries—well, I should give you the full names. The Buckeye Steel Casting Company, the American Steel Foundries, McConway-[fol. 167] Torley Company, the Symington-Gould Corporation. And in Canada, the Canadian Steel Foundries.

Q. Does this coupler, this type E coupler, speaking now of the design and the coupler under an improved design, does that coupler couple automatically by impact without the necessity of going between the cars? A. Yes, sir.

Q. Now, in this case, the testimony—there is some testimony that indicates that there was a bent lifting lever bracket. Will you indicate to the jury what the lifting lever bracket is?

A. This is known as the lifting lever bracket (indicating).

Q. Which is the lifting lever?

A. This is the lifting lever (indicating), the coupler operating lever.

Q. What is that connected to on the coupler itself?

A. The inner end of the coupler lifting lever or the operating lever, the handle portion to the bottom rotary block lifter lever by the hook end, by a hook end.

Q. All right. And the other end of the handle?

A. And to the other end is the handle end, and it is attached to the uncoupling rod bracket.

Q. Well, the purpose of that lever, I take it, is to provide leverage in the first place, and to permit the knuckle [fol. 168] to be opened from the side of the car, is that it?

A. That is correct.

Q. Now, will you tell the jury, and demonstrate, if you can, what effect upon the operation of the coupler a bent lifting lever bracket would have? A. Well,—

Q. Assuming, let us say, that there was a bond caused by the bent bracket which made the lever difficult to rotate.

A. Well, in the first place, that—if there was an excessive binding out at the uncoupling rod bracket, it might be to such an extent as to preclude the operator from opening the knuckle to the full extent, that is, of course, so that it would be only possible to open that knuckle perhaps about halfway out. That could be a possibility.

Q. Well, there is no evidence in this case of such a condition. The evidence was that the lifting rod lever was operated, the knuckle was opened. A. Oh!

Q. And it, the witness said, dropped back into place, or at least was lowered back into place. That was the testimony here. A. Yes.

Q. Now, what effect on the operation of the coupler itself would the binding of the lever at the outboard end, [fol. 169] the bracket end, have? Can you describe that?

A. If the lever were lifting to the full extent and the rod returned to the vertical position—that was your question?

Q. Yes, sir.

A. Then under those conditions it would not have any effect on the coupling, because the lock would drop (demonstrating).

Q. I have got a pair of pliers here. I wonder if we can simulate the binding condition on this.

A. Now, of course, under those conditions, if you opened the knuckle to the full extent, you had a binding, so that

Mr. Hocker: I believe I will recall Mr. Essig, if I may do so. Come back, Mr. Essig, please.

(The witness, FORREST L. ESSIG, resumes the witness stand.)

Further Direct Examination

By Mr. Hocker:

Q. I will show you what has been marked Defendant's Exhibit No. 4, which is admitted to be a photograph of the Pennsylvania hopper car, which was the western car at the inspection involved in this accident. Can you tell the jury what type of coupler that is involved there?

A. It is a type that is called AAR type E coupler, bottom-operating.

Q. Now let me show you a model coupler, which as I understand is a fourth s le model, but that will be subject to testimony tomorrow. With reference to the model which I have here, can you tell me whether this is also a type E bottom-operating coupler of the same time type that was on the Pennsylvania hopper car shown in that [fol. 151] photograph that you have? A. It is, sir.

Q. Does that operate in the same way? A. Yes, sir.

Q. Now, are you able to explain to the jury how the movement of this lever opens and closes the knuckle?

A. When the lever is raised upward from the handle, it raises this toggle which is connected to the knuckle lock, it is connected to the knuckle lock here (indicating) and raises the knuckle lock itself, and that releases the knuckle, the tail of the knuckle, and as the knuckle is closed (demonstrating), the lock drops down, the toggle drops down underneath.

Q. Now, in addition to that action, does the lifting of the lever also activate an arm which rotates the knuckle and opens the knuckle after the lock has lifted?

A. It will slightly.

Q. Does that also open the knuckle?

A. It will open it slightly. It may not open it all the way, but it will to a certain extent.

Q. Now, can you tell the jury whether, after the lift lever has been raised so that the knuckle is open and the lift lever is then returned to its normal down position, whether

this lever would not drop to the floor—to a vertical position, that under those conditions, why, you would affect coupling, because the lock, this particular (demonstrating) —this particular binding would prevent the locking mechanism from dropping.

Q. That would prevent the locking mechanism from dropping and bind the tail of the coupler? A. That is right.

Q. Would that prevent the knuckle from closing and opening? A. No, sir.

Q. All right. Now, let us assume for the minute that you have a coupler with the lever out but not returned to the operating condition, that is lowered condition, there [fol. 170] is no evidence of that? A. No.

Q. Let us assume that for the purpose of this demonstration. Now, if the coupling is made, that is if the car is kicked against another coupling, with the coupling closed, what would become of the knuckle, what would happen to the knuckle?

A. The knuckle would just simply close, but on the rebound the knuckle would open again.

Q. All right. Would there be anything to hold that knuckle closed after that time?

A. No, sir. Not if it were pushed since then.

Q. Now, suppose that car was again kicked from the far end by additional cars being kicked against it, what would happen that next time to the knuckle when it would strike against the other knuckle of the adjoining car?

A. It would just simply close, and if there was a rebound, why, it would open again, or it may abut against the other car.

Q. Now, what would happen?

Mr. Eagleton: May what?

The Witness: Abut, perhaps.

Q. Now, suppose it was kicked, hit a third time, and that would push it again, would the knuckle then close, if it was engaged? A. No, sir.

[fol. 171] Q. I am not talking about locking now. Would the knuckle close?

A. The knuckle would close and it would just simply open up (demonstrating).

Q. So long as the lock was bound in an upward position, the knuckle would not lock, is that right? A. No, sir.

the lock will be prevented from operating, from dropping into place and locking the knuckle, by any binding at the [fol. 152] end of the lift lever? Do you understand my question? A. Do you mean if the handle goes down?

Q. If the handle is returned down.

A. If the handle is returned to its normal position, it should not interfere with the couple, the closure.

Q. To simulate, what effect on the lever would a bent bracket have, Mr. Essig?

A. It could be bent in such a manner that it would have no effect on it, because it would only—if the bracket were bent in itself, it would only change the position where it goes through the lever here that went straight back.

Q. Well, could it be bent so that it bound the operating le[illegible] and made it difficult to operate?

A. It could be; yes, sir.

Q. Well, I would like to simulate a binding on the lever here by this. Now, does that—now, will you operate that lever, see if it operates any degree harder than it did before? A. It does.

Q. Now, if you return the lever to the normal operating position, although bound so that it will not move around and can not move by virtue of the binding, will the lock on the inside of the coupler drop in position when the knuckle is closed? A. Yes, sir.

[fol. 153] Q. Will you demonstrate that for the jury?

(The witness demonstrates.)

Q. Now is it locked? A. It is, sir.

Q. Will you demonstrate that?

(The witness demonstrates.)

Mr. Hocker: You may inquire.

Cross-Examination

By Mr. Eagleton:

Q. All that means, that is what it should do, if it works properly, is lock when you couple automatically by impact, if you have got it open and go against the closed knuckle, it should automatically couple, shouldn't it, if it works properly?

Q. And if the operating lever is returned to its normal position— A. (Interrupting) This way (indicating).

Q. Indicating binding. Is that right? A. That is right.

Q. As the coupling is then made, all the cars are pushed together, would the fact that the operating lever is down have anything to do either with the rotation of the knuckle or the dropping of the lock? A. No, sir.

Q. Will you demonstrate that to the jury?

A. Yes, sir. (The witness demonstrates.) That is locked.

Q. Now, assuming that there was some binding effect caused by the knuckle that was not fully released, that is, the lever arm was locked up and the car was kicked against another coupler, would you expect to find, or following such an occurrence, would you expect to find the [fol. 172] knuckle open or closed following a separation, with the lift lever down, find that condition?

A. You would find the knuckle open.

Q. All right. Now, suppose it was closed, for one reason or another, possibly by hand, would you expect to find the lock locked or in an up position?

A. You would find the lock in an up position under these conditions.

Q. If, following the separation, the lever was found down and the lock in a locked position, what would it indicate to you, with respect to whether that coupler had been open at the time, fully open at the time it made contact with another coupler, the last preceding coupler?

A. Well, it might indicate that the knuckle was not fully open.

Q. Could the knuckle have been fully open at the time it made contact with the last preceding locked knuckle— assume now that the knuckle with which it last came in contact was closed and locked, and operating, or operable, and assume that it made contact with such a locked knuckle and it was found following the occurrence with the knuckle closed and the lock down in locked position, what would it indicate to you with respect to the condition of the knuckle on this car prior to the impact with the other car?

[fol. 173] A. It would indicate to me that perhaps the knuckle was not fully open.

Mr. Hocker: All right. You may inquire.

Mr. Hocker: Wait a minute. I object to the first part of the question, "All that that means," your Honor. That is for the jury to determine. I have no objection to what should happen.

The Court: Sustained.

Q. In other words, if these devices function perfectly and function as they are intended to function, when the knuckle is open and it is kicked down against another knuckle that is closed, then there should be an automatic coupling by impact, isn't that right?

[fol. 154] A. State your question again, please.

Q. If your knuckle is open on any car, at the end of any car, regardless of type, which is kicked down against another car that has either a closed or an open knuckle, those two cars should come together and couple automatically by impact? A. No, sir.

Q. They should not? A. Not necessarily.

Q. Even though—

A. (Interrupting) There are exceptions.

Q. What are the exceptions?

A. One, if the couplers should be such that they wouldn't couple in the proper position, which one hit might send up to one side and one on the other the opposite side, and they couldn't couple.

Q. They would not couple automatically by impact then?

A. That is right.

Q. And then the next car that comes down, that the couplers straighten themselves out, they will couple right after that, won't they? A. The same two cars?

Q. Yes, the same two cars. A. No, sir.

Q. Isn't that true, that right afterwards you can get a [fol. 155] knuckle, if the set there is adjusted so they are not side by side and they don't couple because the pin doesn't drop, and the very next car comes down, as that one motion adjusts them right, and the next one comes down and they couple, don't they, you have seen that done, haven't you?

A. Not unless they are lined up properly. That is usually done by some physical exertion, somebody has to do that, line those couplers up properly.

Cross-Examination

By Mr. Eagleton:

Q. And I believe you said, Mr. Metzger, that a binding of this operating lever rod in connection with this bracket might permit the knuckle to be partially opened, but might cause it to stick, stick in a partially opened condition? A. Yes.

Q. That is because of the bent condition of an operating lever bracket? A. It could be; yes.

Q. That is right. And it would be very difficult for one working in the night time, I suppose, to tell with some accuracy whether the lever arm here (indicating) was all the way back or only nearly so; is that right?

A. That is right, but, of course, the lever does not have to be all the way back. You see, with a knuckle open, all the way open, the lever does not drop all the way back.

Q. That is exactly what I wanted to get at. Even if—

Mr. Hocker: (Interrupting) Let him finish. He had not finished his answer.

Mr. Eagleton: I thought he had. I beg your pardon. [fol. 174] A. Yes. The lock lift is restricted, that is, the opening in the lock lift and the loop at the end of the rod, the operating rod, are so arranged that it would not permit this lever to drop all the way back to the fully vertical position when the knuckle is fully open, or even part way open. See, you notice that doesn't influence the rod one bit, whether as I close that, that knuckle remained in the closed position or if it was fully open.

Q. So that in reverse, Mr. Metzger, you have your lever here, your operating lever in such position that it was not all the way back, and yet your knuckle would be fully open? A. Oh, yes.

Q. That is right? A. That is right.

Q. And you could then, by the same token, have this operating lever which I am pointing to now in a position where it was not fully back, and your knuckle would really be pressing upon, from what you said—

A. (Interrupting) With a binding in.

Q. With a binding in? A. Yes, sir.

Q. So that the binding in here would not make that

Q. That is usual. You have found couplers that would not work on one occasion, and then try them next time and they will work, you have found that, haven't you?

A. Yes, sir.

Q. And then you try maybe an hour later and you find they show they won't work again, they are stiff, or tight, the pin doesn't drop, isn't that right?

A. Technically speaking, your pin has no part to do with this. The lock is the part that drops, not the pin.

Q. Well, the pin and the lock, I am referring to the pin and the lock?

A. This is the knuckle pin here (indicating). That is the lock.

Mr. Eagleton: All right. That is all.

Mr. Hocker: Thank you, Mr. Essig.

[fol. 156] ROBERT G. COFFEY,

a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination

By Mr. Hocker:

Q. State your name, please. A. Robert G. Coffey.

Q. Where do you live, Mr. Coffey?

A. At 2144½ Edge Hill, Fort Wayne.

Q. You live in Fort Wayne, too? A. Yes, sir.

Q. And what is your occupation, please?

A. General yardmaster.

Q. For whom? A. Nickel Plate Railroad.

Q. What yard are you yardmaster for?

A. Fort Wayne. Both yards.

Q. Now, we have had here a plat, which has been marked Defendant's Exhibit No. 1, and which has been exhibited to the jury. You saw that plat in my office yesterday, didn't you? A. That is right.

Q. That plat is admitted to be a correct representation of the yards up there. I wanted to ask you, assuming a car—assuming a crew to be classifying cars in the south [fol. 157] yards—by that I mean any part of the yards

lever handle here that I am holding to go back any farther that way toward the back, would it?

[fol. 175] A. That is right.

Q. It would, if anything, it would restrict it from going toward the back quite as far? A. That is right.

Q. But to me, one looking at it with his eyesight in daytime or night time, he doesn't have to see it back in completely vertical position to know that his knuckle is open, does he? A. That is right.

Q. Now, if this knuckle—is it in this portion, right in here is the knuckle (indicating)? A. Yes, sir.

Q. Once we have got that knuckle open like that (indicating) and it strikes against any object, whether it be a coupler or something, just, if you will, there is no coupler, we will say, down there? A. Yes, sir.

Q. And it strikes against it, it will hold that knuckle, won't it? A. That is right.

Q. And it will effectively lock this thing, just like this is locking it here? A. That is right.

Q. It can even be done by the rod, by hand?

[fol. 176] A. That is right.

Q. So that it doesn't necessarily take an impact with another coupler to cause the knuckle to close and the lock to lock? A. No, sir.

Q. Now, if a knuckle, such as this, I mean, that we have here, should be open, as I open that up with my hand—

A. Yes, sir.

Q. And then it should strike a guard arm on a drawbar—do you know what I mean? A. Yes.

Q. And that is out, with your knuckle other than it should be, on account of some lateral movement in the other drawbar? A. Yes.

Q. If it strikes that, it will cause that knuckle to close, the lock to lock, and no coupling will make, isn't that right?

A. Within certain limitations. Of course, the two couplers have an extensive or quite a large gathering range, is what we call it. The gathering range between two couplers is approximately three and a half inches in opposite directions. In other words, this particular coupler could be moved over an inch and three-quarters in that direction, this particular coupler could be moved over an

south of the main tracks, the eastbound and the westbound main, what is the most expeditious and most safe practice for bringing cars classified as bad-order cars to the repair track?

A. The normal procedure is to switch the cars towards track No. 7, from where they are reclassified at a later time and rehandled to the northside yard for repair track movement.

Q. When you say reclassified, what do you mean?

A. Why, you are not able to handle them directly at the repair track.

Q. Why not? A. Because it is impractical.

Q. And why is it impractical?

A. Because you have no direct access to the repair track from the south side of the yard.

Q. If you were to take each bad-order car direct from the south side of the yard to the repair track, would it require a separate movement, an individual movement for each bad-order car? A. That is correct.

Q. Where would it be necessary to take that, each bad-order car, how would the switching movement go? Suppose it was, let us say, on No. 5 track, let us say, how far [fol. 158] would you have to take it?

A. The car would have to be pulled a distance of about 150 feet west of the switching lead at the west end of the yard and go through the crossover to the eastward track, shove ahead and go back up and down the western track to enter the repair track.

Q. Then it would be necessary for the engine to go back and get another bad-order car? A. Yes, sir.

Q. That might require that each bad-order car would have to make a separate trip from the south end of the yards across both mains and across the north yards to the repair track? A. That is correct.

Q. Now, what happens if the classification is done as you suggested, and as I understand was done in this case, by sub-classification, all of the bad-order cars being taken to the south side of the yard at once, what happens then?

A. They are allowed to accumulate until we have sufficient cars to handle, then they are returned, brought over to the side of the yard.

Q. How many movements, with reference to the bad-order cars, does such a procedure require?

[fol. 177] inch and three-quarters in the opposite direction, and they would still couple successfully.

Q. But if it went over that inch and three-quarters to the left or the inch and three-quarters to the right, if it went beyond that, then they would not couple successfully, isn't that right, or might not?

A. Well, the—if they went without the gathering range, yes, sir.

Q. That is right. In other words, you have in this gathering range an inch and three-quarters to the left or right on the one, and an inch and three-quarters to the left or to the right on the other? A. That is right.

Q. Now, if either one of them exceeded that gathering range, then you could have a contact, with your coupler closing, your knuckle locking, or your lock, and yet you would not have a coupling that could make by impact, would you?

A. That is right. Of course, the instance that I mentioned in the first place was that the couplers displaced this way (indicating). That is, this coupler moved that way.

Q. Laterally?

A. Yes. Now, if you get one like that (indicating), this one in the center, and move this one in in this portion so that the knuckle would contact the guard arm, then that [fol. 178] would be three and a half inches.

Q. Yes. In other words, it is a question of measurement, however. In other words, as to when—

A. (Interrupting) That is right.

Q. When a coupler will not couple successfully? A. Yes.

Q. So that after that has been done, if it strikes some object down on the other car— A. Yes, sir.

Q. Either within an inch and three-quarters or three inches and a half, that causes it to close the knuckle, lock the lock, and that is the way it will appear later when you look at it, and still your coupler wouldn't make, would it?

A. That is right.

Q. So the only thing then to do after that accident, in order to determine what the situation was, at least after the accident, is to look at your drawbars, and their alignment, and all those things, isn't that right?

A. That is right.

Q. And you will often find, will you not, Mr. Metzger,

A. Why, as you had outlined, it requires—

Q. (Interrupting) I am speaking now of moving it from [fol. 159] the south yards and getting over to the repair track.

A. It requires at least two distinct moves to do it that way, yes.

Q. Now, you know nothing about Affolder's accident yourself, do you, Mr. Coffey? A. No, I don't.

Mr. Hocker: You may inquire.

Mr. Eagleton: No questions.

Mr. Hocker: Will you come up, Mr. Eagleton?

(Here ensued a discussion at the bench, off the record, and out of the hearing of the jury.)

The Court: Ladies and gentlemen of the jury, it appears that there are no more witnesses available this evening, but there will be some additional testimony in the morning. I am going to excuse you at this time, and don't discuss the case among yourselves or with anyone else, either, until the case is finally submitted to you and you go to your jury room. At this time you are excused until 10:00 a. m. tomorrow morning. You may now pass out.

[fol. 160] And thereafter, at 4:20 p. m., on Tuesday, June 8, 1948, a recess was had until 10:00 o'clock a. m., Wednesday, June 9, 1948.

Met pursuant to adjournment, at 10:00 o'clock a. m., Wednesday, June 9, 1948, the jury being present, and after the Court had disposed to other matters, and commencing at 10:25 a. m., the following proceedings were had:

The Court: Proceed with the case on trial.

that the contact of the one car with the open knuckle that you desire to lock, out of alignment with another car, outside the gathering range, will cause the car outside of the [fol. 179] gathering range to hold it, it will mean that there must have been a shove over toward there, of that distance, won't it? A. That may be.

Q. Yes. So if you came out right after the accident, you might be able to tell that the drawbar was out of line, or the fact that there was a contact may have corrected some of the malalignment, isn't that so?

A. It may be. However, that three and a half inch gathering range that I mentioned before—see the coupling displacement in the carrier iron—that is the opening—by that I mean the amount of drawbar in striker cast, which is the opening in which the coupler rests.

Q. All right.

A. That usually allows three and a half inches to rest that, so that the coupler could be displaced fully to one side toward the guard arm side, the open knuckle, and the other end of it sagging, it would still couple.

Q. And on the other hand, if it gets outside of the gathering range which you mentioned, regardless of the inches, that can cause it to be unsuccessful, yet your knuckle closes, your lock locks? A. It could be.

Q. That is right. Thank you, sir.

[fol. 180] Mr. Hocker: Are you through?

Mr. Eagleton: Yes, sir.

Redirect Examination

By Mr. Hocker:

Q. Do I understand that if it were to go outside of the gathering range, assuming that one coupler was inside a little—I will withdraw that question. Do I understand you to say that if one was at the extreme side, allowing its entire play— A. That is right.

Q. If the other coupler were centered, that they would still be within the gathering range? A. Yes, sir.

Q. It would have to be necessary for one coupler to be displaced past full play in one direction and the other coupler displaced its full play in the other direction?

A. That is right.

Q. All right, now, let us assume that the car against

which this car was kicked had been kicked on a straight track, straight for a distance off this plat considerably in excess of two thousand feet, twenty-five hundred feet, it was coupled to an engine or to the string of cars—hold this for me, Fred, will you (addressing an assistant)—and opening up the big plat—this movement was made on the [fol. 181] center two tracks, which are straight from one end of the track to clear off the chart on this side (indicating)? A. Yes, sir.

Q. And how much more does not appear from this plat—the distance of seventeen hundred, and five, and four, would be twenty-seven hundred feet?

Mr. Hocker's Assistant: This is one thousand.

Mr. Hocker: That is thirty-seven hundred feet on this chart, and I don't know how much more before that. The kicking movement was made on the center eastbound main here (indicating)? A. Yes, sir.

Q. The track is straight, the couplers are coupled, that is, of the car which was being sent down the track? A. Yes.

Q. And the pin, one or the other of the lift levers was disengaged? A. Yes.

Q. Now, with the car in that condition, as it was rolling down the track, would it be necessary that the coupler be centered at that time? A. No, sir.

Q. Would it be necessary—why is that—will you explain that? A. Well, the car is uncoupled, on straight track.

Q. Yes, sir.

[fol. 182] A. Well, then you would assume that the couplers were in the center at the time when they were disengaged.

Q. All right. Now, would the same thing be true of the next car kicked down in the track? A. Yes, sir.

Q. Would there be any reason to assume, if cars got uncoupled on a straight track here, the couplers would not be in line, center line with the center of the car? A. No, sir.

Mr. Hocker: I believe that is all.

Recross-Examination

By Mr. Eagleton:

Q. Mr. Metzger, in addition to the lateral movement, that will cause a knuckle to work unsuccessfully or a coupler to fail to couple by impact, you have other move-

ments, up and down jerk movements and lowering up and down which will cause an unsuccessful impact, do you not?

A. No, sir.

Q. You don't have that? A. No, sir.

Mr. Eagleton: All right. That is all.

Mr. Hocker: Thank you. You may step down.

Mr. Hocker: With the introduction of the identi-
[fol. 183] fied exhibits, your Honor, the defendant rests.

Defendant rests.

Mr. Eagleton: No rebuttal, if the Court please.

Mr. Hocker: I should like to have an opportunity for the jury to see these exhibits. They have not been passed.

The Court: Let me see those pictures, will you, of the Rock Island and Pennsylvania car?

Mr. Hocker: I beg your pardon, your Honor?

The Court: Let me see the photographs of the Rock Island and the Pennsylvania car.

Mr. Hocker: The photographs, your Honor?

The Court: Yes.

(Mr. Hocker hands the said photographs to the Court.)

Mr. Hocker: Would you ladies and gentlemen care to look at these exhibits and pass them (handing some paper exhibits to the jury)?

Would any of you care to look at the plat again?

(No response.)

(The Court and the jury continue to examine exhibits, and after a discussion at the bench regarding the said exhibits, between the Court and counsel, and off the record and out of the hearing of the jury, the following occurred:)

The Court: To get that straight, the separation took
[fol. 184] place between the Pennsylvania and the Rock Island car?

Mr. Eagleton: That is correct.

The Court: The Pennsylvania hopper.

Mr. Eagleton: That is correct. The other twenty-five cars, of which the Rock Island was the twenty-fifth, rolled to the east..

(Here ensued a further discussion between the Court and counsel at the bench, off the record, out of the hearing of the jury.)

The Court: Ladies and gentlemen, before we start the argument in this case, I will give you ten minutes' recess.

(Recess, ten minutes.)

Which was all the evidence offered in the case.

Mr. Hocker: I also have a motion for a directed verdict, your Honor, submitted with the suggestions on the charge.

(The said motion, being in writing and filed with the Court is, in words and figures, as follows, to-wit:)

(Omitting formal caption.)

"Motion for a Directed Verdict.

"Defendant moves the Court to direct a verdict in its favor and for grounds of its motion states there [fol. 185] is insufficient evidence to make out a claim upon which relief can be granted because,

"1. there is no showing that defendant hauled or had in use, cars not equipped with couplers coupling automatically by impact, and

"2. there is no showing that plaintiff's injury was proximately caused by such a failure.

"JONES, HOCKER, GLADNEY & GRAND, and

(Signed) LON HOCKER, JR.,
Attorneys for Defendant,
408 North [Eightg] Street,
St. Louis (1), Missouri,
Garfield 3850."

Which said written motion for a directed verdict was by the Court marked: "Ruling reserved. R. M. H."

The Court: You may proceed. Thirty minutes on a side.

(And thereupon counsel made their closing arguments to the Court and the jury.)

[fol. 257] Closing Arguments.

Mr. Eagleton: May it please your Honor, and ladies and gentlemen of the jury, you have now heard all of the evidence which will be adduced for your consideration, and inasmuch as you are veterans of the court here, in the sense that you have been on several juries, each of you, I know that you realize the procedure, even in some respects better than counsel. Counsel don't try too many cases in federal court, and most cases are tried in circuit court, where our procedure is somewhat different in so far as submission of a case is concerned, and in any event, it becomes the duty of counsel at the present time to argue the case on behalf of their respective clients, summing up for you those salient points that in their judgment should lead to a verdict, one way or the other, in the matter.

Let me say to you at the outset in this case, and to say clearly, because his Honor declares the law, as you realize, subsequent to the arguments, that is, after we get through arguing, his Honor gives what we call the verbal charges to the jury — it becomes your duty, of course, to listen to those charges and to retain them. That is one of [fol. 258] the differences in our procedure in circuit court or circuit courts, that our instructions, they are called, are read to the jury first, then given to the jury, but just the reverse in the federal court, so you will have to pay rather close attention to his Honor's charges, which you would want to do anyway, and retain those charges in application to the law, under the law and the facts.

I want you to know at the outset that plaintiff here is not contending, nor is plaintiff required to prove, in the sense that there is any contention about that, that there has to be a defect or something wrong in either one of these coupling devices. That burden does not rest on the plaintiff.

In other words, plaintiff does not have to show that there was a bent operating lever rod, that there was a bent

pin lifter, or that there was a cracked knuckle, or that there was anything wrong. Plaintiff does not have to show that at all; and that his Honor will tell you is the law in this case.

The plaintiff's duty is satisfied as long as you find that the couplers on this occasion when put in position to operate properly did not make or did not come together by impact. That is all there is to it, in so far as that particular phase of the case is concerned. I hope I make myself clear on that.

Plaintiff in talking about these bent operating lever [fol. 259] brackets and the cracked knuckle that was on the other car, the Rock Island car, is merely giving you the benefit of what the defendant's own record disclosed with reference to defects that they themselves found in coupling devices after the accident. That they found that this particular lever here or bracket was bent, which would have some bearing on the opening and closing of that knuckle; and that they found that the knuckle on the other car, the Rock Island car, was cracked so that it needed replacement after the accident. That was read to you out of the interrogatories; but plaintiff is under no duty to establish that, because plaintiff's duty begins and ends with the thought that they did not work efficiently, as they should have. Lord knows, that is a fact. And it doesn't make any difference in that connection if they worked a hundred times before this accident, or a million times, or that they worked a hundred times after the accident or a million times.

There is only one thing in that connection; that is: Did they work that time as they should have worked, under the law? Because when you furnish couplers and equip your cars with couplers, that equipping does not mean that you can put them on in 1896, or in 1921, or in 1932, or in 1948, or in 1947. The mere fact that you put them on there is only part of your job as a railroad company. The Court will tell you it was the defendant's continuing duty at all [fol. 260] times and especially at the time this plaintiff was injured to see that its couplers were in shape to couple automatically. That is the law. It casts undoubtedly an absolute duty, as the Court says, on the defendant.

So the plaintiff does not have to show that this thing was defective, it had this wrong or that wrong, or anything wrong, although the defendant seems to abundantly show that it was defective, that both of them were defective, and all of the evidence shows that they did not make, when handled by men of skill who are doing that work as a livelihood, that were not out there singing or joy-riding, they were doing the job to get them to make, that is what they wanted, and the evidence shows without equivocation or without contradiction that when they failed to make, it was the plaintiff's duty and his job to go after those cars and to keep them from doing damage down at the other end, either by running into another crew or other cars, or people that might be working or crossing at the other end, the east end.

It is all well and good to bring in this folded plat, which had a lot of figures, ten feet long, get your plat and say to Mr. Affolder on the stand: "Well, don't you know, Mr. Affolder, that the track holds forty-four cars, and there is only thirty on it?" He answered that like you would answer it—how would he know they had hold of thirty? How did he know they had hold of twenty-five? How did he [fol. 261] know they had hold of ten? He is busy riding cars down on 11, 10, 9, 8, 7, putting the brakes on these other cars, putting these cars in on the eastbound main. He couldn't do two things at one time. When he saw the cars were running away, he didn't know whether they had ahold of forty-four cars or sixty-four cars. How would he know? And he didn't know how far they had gone at that time or how many cars they had put in. He couldn't know. There was only one thing for him to do, was to act now, in the light of his job, in the light of his duty, and then to abide by some safety rules, with a thousand and one other rules there are in books; the first one says you shall observe safety at all times. Safety for whom? Who was observing safety in this case but Affolder? He was thinking not of Affolder, not of his family, he was thinking of the railroad and its safety. What did he do wrong? He was thinking, here is something has gone wrong, the couplers have not made as they are supposed to, as a matter of law; a separation has occurred, big cars with tre-

mendous weight are rolling away downhill; there is other safety involved. Does that rule, observe safety at all times, mean that he should stand there paralyzed and let other people perhaps, or other things go to their doom? And is he to be criticised later, when the cars come to a stop, and say, well, that shows, however, after all, if you had have stayed where you were and thought of your own bread, and your own safety, and your own limbs, and your own [fol. 262] family, maybe that you would not have been hurt, but how did he know they were going to stop, when he saw them rolling away, until they did stop? And even then they had rolled away, even after he had got hurt, they had rolled three more car lengths, but he had no way of knowing where the east end of the train was. You would kind of think under those circumstances that he would get a pat on the back, wouldn't you? You would say, "There is a man I would like to have in my employ. A fellow who is told what to do and does it like a man." What mistake did he make? Had he caused this operating bracket lever to be bent, or some knuckle to be broken, or the couplers not to make? Not go in? Should he have rested on his laurels and said, "This is no concern of mine. The law says they should couple automatically, and they didn't. Let them murder, kill, or do whatever they want to now." But he didn't do it that way. But he did not do it that way. And instead of coming in under those circumstances with criticism, as seems to be prudent, it would be better to say, "Here is a man that proved himself to be a man. For whom? For us, the railroad company. And we owe him and we want him to see what a God-given limb taken from him is worth." You hear the song, you read the poem, "And only God can make a tree." Yes. Get down to the blade of grass. But certainly we know that only God can make the kind of a limb that is worth having on the end of your thigh, that is worth getting you around [fol. 263] not only to earn a living, that is important, vitally important for a young man or even an older man, but there is something about limbs, and the pleasure of looking at good ones, God-given. Why, the mother when she looks at a babe, the first thing she does at birth is to feel the toes, and the fingers, and the hands, to see that they are well-formed, in answer to her prayers. Affolder,

when he feels what he has got left, is it any wonder, when you and I are at home in bed, there will be times that he gets up to cry?

They took the leg away from him on that night, and listen to this: even though they concede there was a separation between the hopper car—the Pennsylvania car, and the Rock Island car, and that is conceded, they don't even take time out to make a thorough inspection of the Pennsylvania car. Instead of that, they photograph two other cars. They photograph the Norfolk & Western and the Rock Island car, but not the hopper car; and they did nothing about examining it or inspecting it with reference to determining how it was coupled or not coupled, although that is concededly where the separation occurred, and in answer to that they say, "Why, we had some information that those were the two cars—the Rock Island and the Norfolk & Western cars—that the plaintiff was working on." He was not working on any car, and they don't bring in a man from whom they got the information. Why did they have to get bad information? Couldn't they [fol. 264] get it from Tielker, if they asked him? Couldn't they get it from Millikan, if they asked him? Why did they have to get some bad information, and now, even after the accident, that a big separation occurred, five car lengths, with a load, not take steps at least to instruct and see what had caused it?

I thank you.

Mr. Hocker: Ladies and gentlemen, sometimes I wonder if it is necessary at all for lawyers to address a jury at the close of a case. You have heard the evidence which came previously. That is why you are here. Lawyers, of course, are here to try the case for their clients. That is why they are here. They are here to present their evidence as strongly as they can, and the only excuse we have to offer for taking your further time with respect to it is because we have lived with the case a great deal longer than you have, perhaps we can help you to read between the lines of the evidence. And, therefore, thanking you for your attention throughout the case and your understanding of the issues involved here, I wish to take a few minutes further to talk with you.

Now, there is one fact which has not been adverted to at all throughout the trial, which I think may be significant. There are ten witnesses who have testified in this case. Eight of them live in Fort Wayne, Indiana. One of them lives in Cleveland, Ohio. The other witness, the doctor—Doctor Simon lives in St. Louis. And he was only [fol. 265] seen by the plaintiff last Friday.

This is a case arising in Indiana, under the laws applicable to Indiana. All the witnesses live in Indiana. The parties are known in Indiana. They are known in Fort Wayne, and the case is tried here. Why? Why is the case brought here? Why, because the defendant can be reached here, the plaintiff can bring his suit wherever he cares to, under the law, and the defendant must come and defend, wherever he may be, and why do you suppose Mr. Eagleton brought the case here, chose to bring it here instead of in Fort Wayne? This is a Fort Wayne case, it arose in Fort Wayne, the injuries occurred there, the hospitalization was in Fort Wayne, the hospital records are available there; Doctor Stauffer, the doctor who did this marvelous job on this sore and leg, is in Fort Wayne; and the other doctors who treated him are in Fort Wayne. And Mr. Eagleton brings the case here. Why? Well, mainly because Mr. Eagleton is a very powerful lawyer in St. Louis; he can make you cry, he can make you laugh, he can make you do what he wants; he is one of the most brilliant orators I have ever seen in a courtroom, and I know, because I have seen him before. He was trying cases when I was in my cradle, and he knows how, he knows every trick of the trade—and I don't say that in any criticism—I say that in admiration of him. He is an excellent, splendid lawyer, and he will make you feel, in his closing argument, [fol. 266] far more moved than you have been in his opening statement, I will venture. But he brings his suit here because St. Louis has a reputation of being a place where plaintiffs can easily recover, where verdicts can go very high, and he sues, brings his case for $150,000. Now, he can bring his suit—a suit for $500,000, or $500,000,000, or $500, if he cares to do so. The amount he sues for, you understand, is of no consequence, so far as you are concerned, being in no sense an index or even an indication of what the plaintiff's damages are.

Now, he will tell you in his closing argument—he will save this for the end—that the amount Affolder has lost $4800.00 and will have lost $4800.00 a year on an average for the rest of his life, and he will multiply that, or he will multiply the number of years he has to live by $4800.00, and he will arrive at a very great sum, which you can do by that means. But you must bear in mind, ladies and gentlemen, that he assumes that he is totally and permanently disabled and never can earn again as long as he lives. Now, you, ladies and gentlemen, know that that is not true. You are aware of the disabled veterans' groups which place people with appliances in jobs that they can do and fill a useful place in the world community. I don't mean to [minimuze] Affolder's loss of a leg. It is a very serious injury; I understand that; but I am trying blindly to guess at what will be perhaps going on in your minds, [fol. 267] because I will not be able to reply to Mr. Eagleton's closing argument.

He is a trained machinist. He worked ten years—assuming that he graduated from high school at eighteen, he has worked for the Nickel Plate for seven, and he is thirty-five years of age, he worked ten years as a trained machinist. He is a skilled machinist.

Now, he left the company that he was working for, the Biscuit Company—whatever one it was—in 1940 or 1941, and went to work for the railroad, and it was not—he did not serve in the army, but not, he says—or the navy—not, he says, because of any physical disability he had. And I think perhaps we may understand why he went to work for the railroad at that time. That is of no consequence here, except to say that that insures his skill as a machinist. Understand that.

Now, you all know that of the men that work with their hands, outside of the artist, the people who have the greatest earning power are the tool and diemaker, the skilled machinist, and a skilled machinist working under those circumstances need not stand, need not run, need not walk, at skilled work. And Affolder is at least, for the experience which he had in graduating from a technical high school, where he was given a fine machinist's education, and ten years apprenticeship in business—Affolder has an excellent background for work he can do.

Now, the witness's own doctor—Doctor Simon does not [fol. 268] treat the man and only saw him once, I believe—but he said he will be able to wear a process appliance and will be able to get about with that one leg; he will be able to sit at a bench and do machinist's work. Under the evidence, there is nothing to show that to the contrary. Whether he will be able to earn $400.00 a month or not, of course, remains to be seen.

I mention that evidence, ladies and gentlemen, so that you will understand the folly of trying to multiply the considerable amount of his earnings in the past year, let us say two years prior to his accident, by the years that he has yet to live.

Further from that, you must bear in mind, too, that the cost of an annuity, if you are going to draw a contract to pay so much a month for a certain number of years, the cost of such an annuity is not the total amount that he pays, because the money which is paid in advance in annuity premium and insurance people get it is earning interest all that time, and under the statutes of Missouri will earn six per cent per annum, compounded. Now, I mention that because you will be confronted with that argument in the closing argument and as justification for this huge amount that Mr. Eagleton has brought his suit for—$150,000.

By contrast—and I mention this only by contrast—I point out to you, ladies and gentlemen, that under the stat- [fol. 269] utes of Missouri and the statutes of Indiana for that matter, the maximum amount which a man can recover for his death, or the death of a wage earner, whoever it may be, is $15,000.00.

Mr. Eagleton: I object to that, if the Court please, as having no bearing on this case, as being improper and not within the pale of the law, and the Court will declare the law.

Mr. Hocker: I think it is perfectly proper, your Honor.

Mr. Eagleton: I am making the objection that he has no right to digress as to the law in other cases. This case is brought under the federal law, and we have death cases under the federal law as well.

The Court: Well, I will permit the argument purely as a matter for the jury in arriving at the figure, if they find for the plaintiff, what is fair compensation. It might be of some help to them. I don't know.

Mr. Hocker: That is the only purpose I mentioned it to you, ladies and gentlemen. You are not bound by any law here with respect to the amount to be recovered. If you find that the railroad is liable, you are the sole judges in that respect, but I am telling you now so that you will understand why I should have pointed out this amount that Mr. Eagleton has sued for here, that the wrongful death statute of Missouri, your state, your total recovery is lim-
[fol. 270] ited to that amount, and the laws of Indiana, where this case arose, provide a maximum limitation of $15,000 which you can recover for such a case, a wrongful death case. You are undoubtedly familiar with the compensation act and the maximum benefits available under the compensation act, and the proportion which the maximum 400 weeks will disallow.

Mr. Eagleton: I make the same objection, if the Court please, to that argument, as being improper.

Mr. Hocker: I don't mean—

The Court: Yes, I believe, Mr. Hocker, my previous ruling was incorrect, because in case of a death, under the statute under which this case is brought, the limitation that you speak of does not apply.

Mr. Hocker: That is perfectly true, your Honor.

The Court: I do not intend to mislead the jury. I don't think that argument is proper. Objection sustained.

Mr. Hocker: Very well, your Honor.

Ladies and gentlemen, I mean that only by way of giving you a notion of what might be proper in a similar instance. Now, as I say, he can sue for anything he wants, and you are the sole judges of that, but I say that is important in considering why this suit was brought here in Missouri instead of Fort Wayne, and the railroad company has no choice about the matter, they must come, or they must defend.

Now, the evidence in the case, the issues in the [fol. 271] case, let me outline them briefly, are only two. The question is, did we comply with the federal statute? And, second, was our compliance—was the failure to couple, as there undoubtedly was a failure to couple here—whether or not that failure of compliance with the statute was the proximate cause of Mr. Affolder's injury? Those are the two issues that you will have to determine. You are responsible on that, on those two issues, because those are issues of fact.

Now, with reference to the first of the two allegations, Mr. Eagleton has told you what he thinks the law is going to be. That is merely his opinion about the law, and what I say and what he says about the law does not necessarily bind you, unless it coincides with what his Honor tells you the law is, and I think he is wrong about that.

He says it is only necessary to show that there was no coupling. I say he is wrong. I say he must show that there was a failure to couple because the car was not equipped with couplers coupling automatically on impact. If they did not couple, and if they did not couple because of some other reason other than the workability of the couplers themselves when properly operated, then there is no liability in this case.

Now, bear in mind this is not a suit brought on negligence. It would have been if Mr. Eagleton had chosen to do so, to sue us for negligence. We have no control over what he sues us on. He could have sued us on charges of [fol. 272] negligence in the conduct of one of our employees; he could have sued us on charges in the way we maintained our yard; he could have sued us on charges in the way we maintained our switches, and the way we had our tracks laid out there. We have no control over that. We have to come in and respond to it.

Now, if he charges us with negligence, there are different defenses which are available to the railroad company. For example, if he charges us with negligence, we are entitled to charge him back with negligence, and let the jury apportion the blame as between the two. But he doesn't do that. Why? Because he wants to deprive us of the right of coming in and saying that he was negligent, too, and we claim we are deprived of that right.

I cannot show that Affolder was negligent. I am not permitted to do that under the law. But he has given up something, too, in making that charge. That is to say, he cannot claim before you that you should merely let Mr. Affolder recover against the railroad company because of something Tielker did wrong, or because of something Millikan did wrong, or because of something somebody in the shop did wrong. He has given that up. He has given that up in order to acquire the benefit that he gets, while depriving us of the very defenses which he would have had to make; so the sole issue is now, ladies and gentle- [fol. 273] men—keep that negligence idea entirely out of the case — the sole issue upon which he can depend is whether those couplers were such as would couple automatically on impact.

Now, Mr. Eagleton says if they did not couple, that is enough. That is not so, and the law won't be submitted to you by his Honor that that is so.

You look at this model; this is an accurate scale model. And this is the only matter really which is significant in the case. It is true that the other coupler on the Rock Island car had a cracked knuckle. Now, a cracked knuckle, according to detail inspection reports that were made by the car inspectors following the accident, has nothing to do with failure to operate. It would not have any mechanical difference, a crack in the knuckle would not keep it from operating the same way; it would weaken the knuckle, and it should be replaced, and should not be run in heavy movements if it is cracked, and it should be replaced . . . but as long as the knuckle is not broken, it has nothing to do with the mechanical operation of opening the knuckle and locking; but assuming, if anybody wants to assume that a cracked knuckle might interfere effectively with the operation of such knuckle—the inspectors' report said it did not—that the knuckle operated perfectly properly; Mr. Eagleton never suggested, either in criticism or in any other way, that the cracked knuckle had anything to do [fol. 274] with the accident. As a matter of fact, the only suggestion with respect to the cracked knuckle is in the answers to the interrogatories, which is that part which I told you myself.

Now, then, we come down to the question, the question which arose this morning for the first time, as to whether the couplers were in alignment, and, in the second place, as to whether the bent bracket of the operating lever could have caused the failure to operate.

Now, those are the only two things here that you have to consider. It won't do, ladies and gentlemen, just to say blindly, well, it didn't work, and there must have been something wrong. Justice does not permit that. Justice requires that you treat that intelligently and inquire into the causes of it, and understanding this is a mechanical device that operates mechanically, you can understand mechanics, and find out the true fact that underlies this proposition.

Now, in the first place, there is no contention, even by his own witness, Mr. Tielker—and I say he is his own witness—he put him on, he vouched for him, and, as a matter of fact, it is shown that Tielker is not frank with the railroad company, so far as disclosing any condition of this sort; that the first the railroad company, according to his own testimony, knew about any difficulty that this operated hard or that there was anything wrong with this coupler was disclosed in the depositions taken by Mr. Eagleton [fol. 275] at Fort Wayne a month—six weeks ago, although he had told Mr. Eagleton all about it in January, of this year.

Now, then, the only evidence of any defect in either coupler that has anything to do with the mechanical operation is the bent bracket. Now, bear in mind there is no evidence there is any bent lifting lever. The bracket is the only thing that is bent, and the suggestion is, the testimony of Tielker is that that bent bracket made it difficult to lift that lifting lever. He says, "I had to pull on it two or three times to open the knuckle, but I did open the knuckle and then I let go." In other words, it fell down. Now, whether it fell down or whether he pushed it down is really of no consequence. The fact of the matter is that it was down, and in order to hold this pin up so that it won't lock, the lever has to be in about that much—see, the closing of the knuckle will lower the lever a certain amount, but it has to be held in that position before the

lock will fail to drop. [It] if it is lower than that, the lock will drop and the knuckle will close and lock. If you lift it up higher than that, it will release the lock and the knuckle will open.

Now, then, if this happened—and this is plain mechanics, I am not arguing any testimony, but just plain mechanics and common sense—if this happened, if this lock was held up so that the knuckle would not lock back, it was closed, tell me, ladies and gentlemen, would this knuckle [fol. 276] be open or closed following the accident? Well, obviously, if the failure of the coupling to make was because the knuckle was not locked closed, it would have to be open following the accident, and Millikan testified that the knuckle was not only closed—and remember Mr. Eagleton took Mr. Millikan's testimony, too, up there in Fort Wayne after his own interview. This Millikan testified that following the accident this knuckle was not only closed, but the pin was seated, the lock was down, so that he had, in order to open it, he lifted the lifting lever too.

Now, then, no matter how you bind—this lift lever here gets bound, bracket or any other means, we can do it repeatedly here, no matter how that is bound, there is only one of two lines to follow, that either you can rotate that lift lever or you can not. That is the only thing can happen. It depends on the strength of that bind. If you put enough strength into the bind, you can't lift the lift lever at all, in which case Tielker is mistaken about having opened the lock. So we can drop that phase of it. If the bind is not so hard as to prevent it opening at all, then you can, after pulling hard, as Tielker said he did, open that lock, and you can push this back there (indicating). If that is done—that is what Tielker said he did—this is a coupler coupling automatically by impact, ladies and gentlemen. It operates just the same whether this (indicating) [fol. 277] is bound or whether it is not bound, because it is now in an operating position. This is the position (indicating) that is supposed to be, and you insert it solidly (demonstrating)—and if the lever was in that position, the pin would lock when that (indicating) was closed, when that (indicating) was closed the coupling would make.

Now, the answer to that, ladies and gentlemen, is the

only possible answer, and in this case this is the only possible answer under the physical facts, ladies and gentlemen, is that this knuckle was closed when the Pennsylvania car was kicked down on to the Rock Island car. Now, when you have a physical demonstration which does not support the testimony of a witness, and when you do that in ordinary life, when you see the location of an automobile after an accident, and when you will see a broken dish on the floor and your child says that he did not knock the dish off the table, and there was nobody else in the room, there is only one conclusion that you can draw: the physical facts are correct and the testimony is wrong.

Now, bear in mind that Tielker said nothing to anybody about the operation of this lift lever for five months after the accident—September, October, November, and December, January—four months, I guess after the accident—he said nothing to anybody, and then spoke to Mr. Eagleton. And he said nothing to anybody else until four months [fol. 278] farther along, when his deposition was taken, but for four months he said nothing to anybody about whether or not he opened that lift lever prior to the accident. That is what he said.

It may be, ladies and gentlemen, that he, like Millikan, opened that lift lever after the accident, and perhaps, as the wish is often father to the thought, the reason he thought he opened that lift lever before the accident instead of after the accident was because if, as Mr. Eagleton claims, the separation was the cause of the loss of Affolder's leg, and if he did not open this lift lever before he pushed the car down against the Rock Island car, who was to blame for the loss of Affolder's leg? Why, his friend Tielker. And do you suppose, if Tielker thought of that for four months, it might be that the wish would be father to the thought, that he remembered that he opened the lift lever before he kicked the car down there?

Now, bear in mind, too, that that movement in which he kicked that Pennsylvania car down there was the fourth movement prior to the separation, and the accident did not happen until this fourth movement, where they had gotten these cars down at the other parts of the yard, nobody knows, but it certainly would have taken them a half hour

to make the additional movements required to get those cars in there, and he tells you that he remembered that he opened that knuckle prior to kicking that Pennsylvania car [fol. 279] down there, and he tells you that while he did not make any mention to the claim agent who was investigating the accident immediately after the accident, made no mention of it to anybody else in his own report, until Mr. Eagleton came to see him some four months later, that he now remembers definitely that he opened this knuckle prior to kicking it down. That is his testimony.

Now, Mr. Eagleton scolds the claim agent who investigated this matter for not having looked at the coupler at that time and having had a photograph made. Of course, the claim agent could not get there until the next morning. He did not know that there was any accident until long after Affolder had gone to the hospital. Everybody, of course, was figuring, said Affolder was dying from loss of blood there, and would have to take care of him as he lay there. That was the primary purpose in everybody's minds. That is what the railroad did, and the railroad has provided him with hospitalization and best surgical care, provided the best of medical care, and still doing it, has spent over $4,000 in taking care of Affolder during that time, this period, and has done so without regard for expense. Nobody contends that we have not done a good job, so far as medical care is concerned, for Mr. Affolder, but as I say then the next morning we have no knowledge of how this accident happened, except the fact Affolder is the only one there, he is unable to tell anybody, and doesn't tell anybody, in fact does not [fol. 280] know.

Now, then, we don't know whether we are going to be charged with later on—of course, for that matter, we don't know whether we are going to be charged with negligence or failure of the safety appliance act defect, but for all we know, Affolder may claim that he was caused to fall by this object which he claims rolled under him, and that we were negligent in having an object there, so we would therefore have inspected the track and the space between the tracks to foreclose any claim of that sort. We don't know whether he is going to claim there was a defective

grab iron on the side of the car he was standing on, or defective step of the ladder that caused him to roll. We don't know whether he is going to claim one of the other things he could have received. It just happens that he claims now that the cause of his accident is failure to couple, when he was injured between the Norfolk & Western car and the Rock Island car.

Now, if it was your obligation to investigate that accident, ladies and gentlemen, what would you investigate? Why, you would investigate the two cars he was between when he was injured. He hasn't told his story, nobody else has told his story. That is what you are going to make an inspection of. That is what we made our inspection of, of both cars, and perfectly proper. There was no safety appliance defect on either car, now, despite that answer of that [fol. 281] interrogatory Mr. Eagleton puts to you about the crack in the knuckle—both knuckles—and I don't know which end of the car that cracked knuckle was in, because so far as anybody knows, it did not have anything to do with the accident, it is not claimed here that it had anything to do with the accident, despite that circumstance the inspection report shows that both knuckles were operating mechanically perfect on both ends of that Rock Island car. Now, I say we must make whatever inspection is available to us. That is the inspection which was available to us, that is the inspection we made.

Now, then, six months, eight months later, Mr. Eagleton charges us with negligence—not with negligence, but with violation of the Safety Appliance Act, on account of these couplers, and he said that the reason that the couplers had anything to do with the accident was because Affolder, who was five tracks away, standing in a place of safety, considered it his duty to run over and stop those cars.

Now, substantially, it is Affolder's testimony that he was down there and ran over to attempt to stop the cars that he saw rolling, it was dark, he said, and smoke and steam from the engine obscured the lighting of the floodlights, and of course floodlights at night are not comparable to daylight at best. Whether he was doing that, we have got to take his word for it; I don't know what he was doing, of course. He was the field man. He said he ran

[fol. 282] across those tracks in the night. Now, that is significant on this account: his Honor says that you are only to hold the railroad responsible for something it did wrong in the first place, in this case to violate the Safety Appliance Act, if you find that it did, only if that violation of the Safety Appliance Act is the proximate cause—the direct and proximate cause, I think his Honor would say, of the injuries Affolder received. And the reason no investigation, no particular investigation was made of the Pennsylvania car at that time, although there was a routine inspection made and the coupler was found operative, although there was a bent bracket, not a bent lever but a bent bracket—Mr. Eagleton said lever in his opening statement—but the reason no particular inspection of the Rock Island car was made was that nobody had any notion that anybody would claim that Affolder's injury was caused by the separation. The separation, after the chain of cars came to a stop, was between four and five cars. Everybody agrees to that. It was between four and five cars. Affolder said when he first noticed that separation, the separation was then two and a half—two to two and a half cars of separation, so after he saw it some four tracks away, those cars moved two and a half car lengths, something like that—three car lengths—I don't care—120 feet these cars moved.

Now, he knew that he had tied those cars down—and Mr. Eagleton's expression here—by an Ajax brake; he knew [fol. 283] they were locked, he knew they had been kicking cars against them all night and they hadn't moved; he knew, therefore, that the brake was set on that string of cars down there; he knew that it was moving very slowly, indeed, and it must have been moving about right at that time five miles an hour—that is an absolutely level track at that particular point — because, five miles an hour, wouldn't have stopped—twenty-five cars won't stop in the 120 feet, with the brake set, one of the cars tied there, because he ran from No. 7 track switch across four sets of intervening tracks and down to the last, to the east end of the last car in the cut before he was injured.

Now, while he was running all that distance, the cars, of course, were moving. You have them moving, of course,

in our case, but presumably they had only a distance of three car lengths to move, while he covered that entire distance, because that is as far as they moved after the accident, they were stopped.

The Court: You have two minutes left.

Mr. Hocker: Thank you, your Honor.

So during the intervening time, while he ran that distance, the cars moved, say, two car lengths, so by the time he got there, the cars were moving so slowly that they moved only one car length before they stopped, stopped still.

Now, under those circumstances, ladies and gentlemen, I say to you that the proximate cause of Affolder's injury [fol. 284] was not the separation, but was Affolder's own determination to run across there in the track and try to get on that car, although it was stopping fifteen or sixteen car lengths in the clear at the other end of the track.

Now, ladies and gentlemen, you have heard the evidence, you have heard what I have to say. I thank you for your attention and your understanding, and I am sure that your verdict will be a just one to both parties. Thank you.

Mr. Eagleton: May it please your Honor—

The Court: You have fifteen minutes.

Mr. Eagleton: Ladies and gentlemen of the jury, I don't know what you got out of that argument by way of what this case is, but I know he has misstated what I say the case is. I don't say, and never told you, never will, nor will the Court, that if there is merely separation of cars, plaintiff shall recover. I simply told you, if there is a separation of cars after those devices were put in operation and did not operate, then they failed to perform their duty, regardless of how they operated before or since, and that we do not have to prove—and the Court will tell you that emphatically—any defect. He would like to have you think that I have to prove something about an operating lever. I don't. I don't know anything about it. I don't think you care anything about it. I don't think anyone cares anything about it but him, and he may like to believe

[fol. 285] that that device did it, but that is not interesting you. The fact is that Tielker, who was there, says that he opened that particular knuckle with difficulty. and he remembered it. Naturally, would you remember something in connection with a man's leg being taken off right then and there? You don't take legs off so often, every night, or every week, or something like that that would get out of your mind. Would you remember that you had trouble when you saw that there was a separation? Was there a separation? Did Affolder make that up? Did Eagleton make that up? Why, it was there, and they concede it was there—five car lengths of a separation. And he says, what would you do if you were going to make this investigation? Wouldn't you examine the thing that went wrong?

I don't say even what something went wrong.

He says everybody was worried about Affolder, because he was bleeding to death. He says: "We have a claim agent was worrying because he was bleeding to death." I got the impression that if he had bled to death, apparently that it would be cheaper, that there would be less charge, less damages recoverable, although the damages recoverable are under a federal law, not under a state law. And when he says, "under the laws of Indiana," as his Honor has corrected him, that is wrong. It is the law of the United States Congress and has been since 1899; no new law. It is an old law. And it is an old law that gives the [fol. 286] plaintiff the privilege or his counsel, to bring his action at the place most convenient to him, which he thinks is most satisfactory, not at the place, as they would like to have that law, which they describe, where maybe they can take care of things.

Mr. Hocker: Well, [of] your Honor please, I object to that argument, persoually and on behalf of my client, I resent it.

The Court: Yes. That is not proper, Mr. Eagleton. The jury will disregard the reference that they can take care of things.

Mr. Eagleton: Well, at any rate, he did say this: he did say that the reason I brought the action here is because

I can wring from you and get you to do anything I wanted, and I don't believe that is true; I don't believe that is a fair statement to you, that I can get you to do anything that I want. What superior people do they have in Fort Wayne, Indiana, that are superior to you in any way? Not only superior to you from the standpoint of intellect, but from the standpoint of integrity? I have no fears of you, but I certainly have no mistaking about the fact that I can control you, any more than I can control somebody in Fort Wayne, Indiana, or any other place. There is nothing to control about it.

Now, let me ask you, did Tielker open that knuckle or not open it? He says that when he went to open that knuckle, he had difficulty in opening it—he had to push it [fol. 287] three times, when it failed to open the first time, showing something was stuck. We have never had anybody examine the insides of that thing like this man did here today. He took some time getting it apart and some time getting it back together again, although an expert that made it. Or on what elevation this way, or the jarring, what put the knuckle that way, depends—not a single soul.

Here are two cars that are separated, and it is wrong to have a separation. It is something unusual to have a separation. What would you look at, if you would not look at the very cars that were involved? And why didn't they look at that particular car that day? Or since that time? Or any time?

This bad-order card—remember this is on the front end of it—and that is car Pennsylvania 727512. Tielker did not make that. I did not make it. Affolder did not make it. It is on the end of a car, and it is tacked here, he cannot see what is on the back of this thing; might be there was nothing on the back of it at that time. At 6:00 o'clock —6:00 a. m.—he is hurt at 3:30 a. m.—they find that bent operating lever rod, or bent operating lever bracket, don't they? They find that themselves. This is their card, this is their record.

What does this card do then that I have in my hand? What does it do? It confirms Tielker, doesn't it? Doesn't [fol. 288] it confirm him? Could you get any better con-

"'But it has long been settled that the chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence, and such normal reaction has been held to include the instinct toward self-preservation, Scott v. Shepard, 2 W. Bl. 892 (the lighted squib case), and the equally natural impulse to rush to others' assistance in emergency, Wagner v. International Railway Co. (Cardozo, C. J.), 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (the danger invites rescue doctrine). This rule of causation has been repeatedly recognized by this court. Sandri v. Bryam (C. C. A.), 30 F. (2d) 784, 786; Erie Railroad Co. v. Caldwell (C. C. A.), 264 F. 947.'

"The point on which the cases turn on the proximate cause issue, as we understand them, is set forth as follows:

"'to determine whether there was a continuous succession of events leading proximately from fault to injury, the test is not whether the plaintiff was acting in performance of his duty when injured, but [fol. 230] whether his act was a normal response to the stimulus of a dangerous situation created by the fault.'

"A fact in the Brown case considered by the Court was that the moving car was traveling in the direction of a tunnel and while no train was seen or heard coming through the tunnel, the question was posed by the Court—'if reasonable men might fairly differ' upon the point whether the danger was so imminent 'as to make Brown's hurried effort reasonably a normal response to the stimulus of apprehended danger.' We endeavored to instruct the jury fully on this aspect of the law as determinative of whether violation of the Safety Appliance Act was the proximate cause of plaintiff's injury, and to the charge in that particular no exception was taken. In principle we can see little difference between the plaintiff in this case and the plaintiff in the Brown case. Each was injured by a fall before he reached the point where his efforts would become effective in the performance of his duty in stopping the moving cars, one before he had boarded the car, the other afterward. As we understand the law it is not the location

firmation than that? Here is a man says: "At 3:30 in the morning, I tried to lift that device, and it was stuck, so that I had to do it three times."

Mr. Hocker: I am sorry to interrupt, your Honor, but that is not the evidence. The evidence is not that he said at that time he had to lift it three times. The evidence is he said four months later he tried to lift it up two or three times.

Mr. Eagleton: No, he is wrong about the evidence. His evidence was that on that morning, when he tried to open that knuckle—not what he said, but what he did on that morning—that is what he said from the stand, that is what he testified to. We all heard that, and Mr. Hocker mentioned it here a minute ago, that he tried to get this thing open by pulling on it three times and finally got it open and discovered when he got it open that it had a bent lever bracket that was binding. Isn't that what he said?

Mr. Hocker: That is all he said. And did he confirm it?

Mr. Eagleton: Why, he is confirmed by their own record. Now, when they get that record in their possession, and it has got the car number on it, and it conforms with the switch list and the car where the separation occurred, does it take any shining mind by some forceful intellect [fol. 289] like Mark Eagleton to say, "Well, if the car separated there, inspect the car, take the coupler apart, and let's find out what was wrong with it, if anything." They don't do it. They don't show you if it worked right even before this accident or after this accident, or at any time. They either don't look at it, or at least we don't hear any more about it until when? May 22d, they photographed the car for you. Very nice of them. Bring you a nice photograph.

Well, who took the coupler apart or inspected it, to find out if its parts were working or not working?

And remember again, and get me right, I am only arguing this because it is so probable and plain that plaintiff does not have to prove or establish that there was a defect in there. I don't care if there was none; it didn't work. And the experts say sometimes they will work and some-

times they won't, because they may be hit at a knuckle, on a drawbar or something.

Did Millikan or any one of the men walk down to the Rock Island car? We are not confined to the Pennsylvania. His Honor's instructions or charges won't say that the plaintiff is confined to any car. Did anyone walk down to the Rock Island, to see how that drawbar was after the accident, after five cars of separation? They did not even walk down. Didn't they have a yardmaster, a yard foreman? Why didn't they call some of those car inspectors [fol. 290] then? They were not all putting Affolder in the hospital.

They said it was part of their duty immediately following the accident to find out what caused it. When did they do it? They didn't do it at all, and they haven't ever done it yet. So all we know is there was a separation, and here now in the last analysis they depend on two things. The first is that Affolder, seeing this thing running away, estimating it five miles an hour, with a lot of tonnage, twenty-five cars going down a hill, that he should have said: "Now, let me see. I remember one time in court Hocker had a plat which showed 763-782, it showed there was a lead that stands for forty-four cars; now let me see; I will stay here and wait to see what happens"? Why, what would have happened to Affolder if he stayed there? Or what might have happened—not what did happen—to the cars? He had to act now; and his Honor will tell you the test is, did he act like a normal, prudent, intelligent man? I say he was normal, he was intelligent, and he was courageous, not his thought, but it was what the railroad wanted him to do, and he was doing it for it and not for himself, because that was his job.

Remember, Mr. Hocker says: "Whoever told you that? Whoever told you you had to go after cars?" Why, he mentioned name after name of employees who said that he had to do that, when he broke in as a new man, and who repeatedly gave him those instructions, and to others. And [fol. 291] did they bring one of those men in to deny it? Have you heard any denial? Only Mr. Hocker—and remember, please remember this is not the case of Eagleton vs. Hocker, or Hocker vs. Eagleton. My charming young

of plaintiff at time of injury under the 'danger invites rescue' doctrine. Whether the conduct of plaintiff was a normal response to the stimulus of a dangerous situation created by the fault of the defendant in violating the Safety Appliance Act was a question for the jury. See also Anderson v. Baltimore & O. R. Co. (C. C. A. 2nd, 1937), 89 F. 2d 629, and Erie R. Co. v. Caldwell, [fol. 231] 264 Fed. 947.

"We have neither overlooked nor ignored decisions which would seem to support defendant's position, such as Reetz v. Chicago & E. R. Co., 46 F. 2d 50. The same Court wrote the opinion in the Reetz as the Brown case. The Reetz case is referred to in the Brown opinion with the observation:

> "'We rejected in the Reetz case the test of duty as a criterion of liability . . .'

"We have examined many cases which follow the line of reasoning of the Reetz case. In many of them the division is narrow whether or not proximate cause is a question for the jury. We think this is a borderline case but considering the movement of the cut of cars had started, due to the failure of the coupling to couple automatically on [imact], (the duty of plaintiff under the circumstances thus presented) and the probability of the movement if not stopped would cause injury, and faced with this dangerous situation we cannot say as a matter of law that the action of plaintiff, an action he was engaged in at time of injury, was not a normal response to a dangerous situation even though reasonable men may differ on the subject. There is no evidence plaintiff is not a normal person. Seeing the movement of the cars he sprang into action for one purpose only, to stop the movement and avoid resultant injury to person or property. His motive and action was identical to that of the plaintiff in the Brown case.

[fol. 232] Order.

"Motion of the defendant to set aside verdict and judgment entered thereon and to enter judgment for defendant in conformity with its motion for directed verdict

friend, who is sagacious and suave, would like to resolve this into a contest between him and me, because, unfortunately for me, I have never had such a winsome, splendid, smooth disposition that I make friends so readily. And it may be, because he has only been trying cases some fifteen years and has risen to the heights where he can be employed by the bigger corporations, transcending all, where with the average young lawyer, at least in my first fifteen years, they never seemed to want me or need me, but he has gone fast, and he would like to have you say: "Gee! gee! Didn't that fellow Hocker put it all over that Eagleton! Why, he made him look like a piker. On astuteness or on knowledge, why, he even reigned supreme."

This case, however, fortunately for me, is not the case of Eagleton vs. Hocker. It is the case of Affolder vs. the Nickel Plate Railroad Company. Affolder, the man who swore he was under a duty, and told by four or five men to go after those cars when a similar situation occurred, and without denial. Affolder, who in the night time, to save their own property, was doing what a normal, intelligent man would do.

[fol. 292] The Court: You have three minutes.

Mr. Eagleton: May I have just a minute or so?

The Court: Three minutes.

Mr. Eagleton: How much?

The Court: Three minutes.

Mr. Eagleton: And, gentlemen, don't you get the give-away? Don't you get the tip-off, as they say, telling how the wind is blowing? The thing that seemed to interest him most was how we could multiply damages. $400.00 a month for thirty years, and from 45—or $5,000, in round figures, per year—forty-eight hundred it is—take $5,000.00 per year, that is $150,000. He said, "Now, Eagleton will tell you just how to do that. Thirty times five is a hundred and fifty." Well, you don't have to pay any attention to Eagleton. His Honor will instruct you on the measure of damages. His Honor will instruct you that his loss of earnings, past, present, and future, is only one single item of damage. His pain, his suffering, his mental pain or

physical pain, his physical anguish and his mental pain are all to be incorporated in your verdict, in addition to that.

Gee! I think sometimes, even though we grow old—and I am getting there—I am a little older than I would like to be—I would like to live some of it over, maybe—but you look at those legs, I wonder if all men don't find enjoyment in still being boys? Boys not only in their boyhood, [fol. 293] but boys in your young fatherhood, to romp and play with your kids, your boys, even when you are a grandfather, you take them by the hand and walk down the street with them like an ordinary human being, and not wondering, as any child must, "Pop, what happened to you?" There is something to legs besides earnings, and I am asking you, you alone, to put the price to the Eternal Maker when you are walking on two legs, and then return and hand that verdict to his Honor, you tell him, because it is your prerogative alone, what that leg is worth, and tell your Maker, and I will be satisfied—don't worry about what Eagleton thinks, but I would certainly want to be satisfied, if I were in your place, when I sat before my own fireplace, warm and rested, I had a chance at least once to say what a God-given leg is worth, and I said it.

I thank you.

[fol. 185] (The arguments were concluded at 12:25 P. M.)

The Court: You gentlemen come up here.

(Here followed a conference at the bench between the Court and counsel, off the record and out of the hearing of the jury.)

The Court: Ladies and gentlemen of the jury, I am not going to charge you now, because I would not have time [fol. 186] to do it before your regular lunch hour. I am going to let you retire now for your lunch hour. I have a little work to do before I can charge you, so if you are back by 2:30, that will be sufficient time. And go to your jury room when you return, the bailiff will notify you when ready to continue. You are now excused until 2:30.

At this point, 12:25 p. m., Wednesday, June 9, 1948, a recess was had until 2:30 o'clock p. m.

After recess, at 2:30 o'clock p. m., on June 9, 1948, the jury being present, the following proceedings were had:

The Court thereupon charged the jury, as follows:

The Court's Charge to the Jury.

The Court: Ladies and gentlemen of the jury, you have listened to the evidence and the argument of counsel in this case. The argument of counsel had to do largely with factual matters of the case, which is perfectly proper, and it now becomes my duty to give you instructions as to the law by which you will be bound and which you will use in reaching a verdict on the questions that are presented to you for a decision in this case.

At the outset, I want to say to you that you are a part of the administration of justice in this court, in this [fol. 187] case, and a very imporant part. You, as the jury in this case, are just as much officers of this court as I am, as the judge of this court, and it is just as necessary that you perform your duty as officers of this court as it is that the judge of this court fairly, impartially, and in accordance with the law, conduct himself.

Under the practice of this court, instructions are given to you orally, and I have no authority to give them to you in any other manner. It, therefore, is necessary that you pay close attention to these instructions. I will try to make them as plain as possible. I don't think this is a complicated case. The issues are simple, and I think I can state the law to you so that you will have no difficulty in understanding it and in applying it to the factual issues that are submitted to you.

Now, bear in mind that these instructions are given to you as a whole. Don't attempt to separate them and use part of them in determining the issues and disregarding the remainder, because in that way your verdict would not be applicable. They are given to you for use and application to the case and to guide you in your deliberations as a whole, and I hope as a whole that they will be intelligible to you.

I may, in the course of these instructions, according to your ideas, make some comment on the evidence. If I do, and what I say about the evidence is different from what [fol. 188] your recollection of the evidence is and what your understanding of the evidence is, you disregard what I say about the evidence that is in conflict with your understanding of the evidence. I say that to you because you are the sole judges of the witnesses and the weight to be given to their testimony, and you pass solely on the facts, and with that I have nothing to do.

As I indicated, you are trying factual issues in this case. You are not trying the parties, in a sense; certainly you are not trying the attorneys. As you decide the factual issues, they compel you to render a verdict one way or the other in this case, and you render a verdict in this case because of that compelling reason, not because you may want to take money from the defendant and award it to the plaintiff, or that you might want to deny the plaintiff a money judgment in this case, but because the factual issues, as you determine them, compel you to render a verdict either for the plaintiff or the defendant in this case.

Now, it is your exclusive province to judge the facts, and with that part and that phase of this case I have no part. That is what you are for in this case. But your decision as to the facts must be in accordance with, and you must follow, the law as you receive it from me, and follow it whether you agree that that is good law or should be the law, or is the law, or not. That is my responsibility in this case.

This case is based upon a charge by the plaintiff [fol. 189] that the defendant failed to comply with the federal law, or a federal statute, known as the Federal Safety Appliance Act, and, briefly, this law prohibits all railroads operating in interstate commerce to use any car in interstate commerce that is not equipped with couplers which couple automatically on impact.

It is the position of the plaintiff in this case, as I understand the record, that on the occasion in question, the 24th day of September, of last year, he was a brakeman in the defendant's yard; that on this main east and west track there was a separation of the cars on that track. The

numbers of the two cars where the separation occurred were given to you, but I prefer to use the names of the cars, because I think that is much easier for you to remember. One of the cars was referred to as a Pennsylvania car, and another car was referred to as a Rock Island car; and between these two cars the coupling, for some reason, and that is for you to determine, was not connected, and they separated, and the string of cars to the east of the break, some twenty-five cars started a movement to the east, and the plaintiff, who was some four or five tracks to the south of the track upon which this movement was located, some 3:00 o'clock in the morning, the searchlights in the yards, some evidence about the obscuring of vision by beam or smoke from cranes, but he saw the movement of these cars start to the east.

As I recall his testimony, he said that he hurried [fol. 190] over there, and that he reached a point very close to the car that he intended to get on; I believe he said some two or three feet; that is not exactly material, whether it was two or three feet, but anyhow, for some reason, so he testified, his foot stepped on some object, or for some reason he slipped, or fell, when he was attempting to board the car, and his leg passed over the rail, under the wheel, and received injuries which caused this amputation.

He testified that he was going to the car to get on it for the purpose of setting the brake and stopping the movement of the car.

Now, it is the position of the plaintiff, as I understand it, that the separation of the cars which started this movement which the plaintiff testified he was going to attempt to stop, and which he testified was a part of his duties, it is the position of the plaintiff that the separation was due to the failure of the defendant to equip the cars with couplers that couple automatically on impact. And that, second, the failure that I have just referred to was the proximate cause of the plaintiff's injuries.

Now, on the other hand, as I understand it to be the position of the defendant, no denial but what there was a separation of cars, but the defendant denies that the separation was due to any failure on its part to equip or that the cars were being used without being equipped with

[fol. 191] couplers which couple automatically on impact. And, second, that regardless of what caused those two cars to separate, it is further the position of the defendant that the failure of the cars to remain together, or, I might put it, a separation of the cars, was not the proximate cause of the plaintiff's injuries.

Now, that, as I understand it, states the respective positions of the parties. So the case resolves itself down to a very simple issue: a decision on two questions by you:

Did the defendant use cars in interstate commerce on the occasion in question that were not equipped with couplers that coupled automatically on impact, first?

Second, if the defendant violated the statute in the respect I have just referred to, was such violation the proximate cause of the plaintiff's injury?

Now, that is the issue for your determination. There is no question in this case on the interstate commerce feature. You don't need to be bothered with that at all. With commendable candor, and to avoid any lengthy trial, the parties have conceded that the train was in interstate commerce.

Under the law as I have referred to, in this case the defendant had an absolute and continuing duty not to haul or use on its lines any car not equipped with couplers coupling automatically on impact. And it was not only the duty of the defendant to provide such couplers, but it was under the further duty to keep them in such operative [fol. 192] condition that they would always perform their function.

The plaintiff, in order to discharge the burden of proving a breach of defendant's duty, is not required to prove the existence of any defect in such coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact.

Now, I charge you in this case that if you find and believe from the evidence that at the time and place mentioned in evidence, defendant was hauling or using on its lines one or more cars equipped with couplers which did not couple automatically on impact, and that by reason thereof a separation occurred between the Pennsylvania hopper car and the Rock Island box car, and that said separation was due to a failure on the part of the couplers

of either car to function properly and to couple automatically on impact, then in that [even] you are instructed that the defendant violated the Safety Appliance Act that I have referred to.

And if you further find and believe from the evidence that such violation, if any, directly and proximately caused, either in whole or in part, plaintiff's injuries and damages, if any he sustained, as referred to in the evidence, then your verdict will be in favor of the plaintiff and against the defendant in this case.

On the other hand, if you should find and believe from the evidence that the separation of the cars, that is, the [fol. 193] Pennsylvania car and the Rock Island car, was due to some other cause, that a failure to provide couplers coupling automatically on impact did not cause it, or that the separation of the cars, regardless of its cause, was not the proximate cause of plaintiff's injuries, then your verdict in this case should be for the defendant.

Now, you will understand from what I have said to you that the plaintiff does not found his action and his claim upon negligence upon the part of the defendant; no negligence charged; the charge is a violation of an absolute statutory duty; and under the statute upon which the suit is based, and which I have referred to, if you find there was a breach of such duty, the defendant railroad can not defend the cars upon the ground that that plaintiff was also negligent, or that the accident was caused by negligence of some fellow servant of plaintiff, or that plaintiff assumed a risk of any operation engaged in; so the question of negligence upon the part of the plaintiff is not in this case. Any question of contributory negligence upon the part of the plaintiff is not in this case. Any question of negligence of a fellow servant is not in this case. Any question of the assumption of risk by the plaintiff is not in this case. Those matters you should not concern yourselves with in arriving at a verdict in this case.

But similarly, plaintiff has no right to recover in this suit for any negligence of the defendant, if any has been [fol. 194] shown; so you can not hold the defendant liable in this case for any act or failure to act of Tielker, who said he was a pin man in the engine crew (and as I recall, he testified to opening the coupling so it would couple on

contact to, he said, with the car to which it was being shoved or kicked), or any other employee, or any defect or obstruction in the condition of the yards; that is not in this case.

Now, I reiterate, the plaintiff charges the defendant with liability in this case based upon the violation of a federal statute, namely, a statute which requires and places the duty upon the defendant that it shall not haul or use cars that are not equipped with couplers that couple automatically on impact. The defendant denies the charge of the plaintiff in this respect.

The plaintiff also charges that the proximate cause of the injuries sustained by him was due to the failure of the defendant to comply with the statute which I have just called to your attention. The defendant denies that, regardless of whether it did or did not violate the statute, that the injuries sustained by the plaintiff were (due to) the proximate cause of the failure of the cars to couple automatically on impact.

Now, the burden of proof rests upon the plaintiff to sustain the charge he has made in this case by a preponderance of the evidence; that is, by a greater weight of the [fol. 195] evidence; that is, these two propositions: that either the Pennsylvania or the Rock Island car referred to in evidence were not equipped with couplers coupling automatically on impact as required by law, and that the plaintiff's injuries were directly and proximately caused by reason of such failure to equip said cars, or either of them, with the couplers coupling automatically on impact.

Now, by the words I have used, preponderance, and the greater weight of the evidence, I mean evidence which is the most convincing to you and is more convincing than that which has been offered in opposition thereto.

If you should find from the evidence touching the burden of proof which rests upon the plaintiff that it does not preponderate in favor of the plaintiff, or is evenly balanced, then in that case plaintiff has not carried the burden of proof and is not entitled to recover in this case. More specifically, although you may find that both or either of the cars referred to were not equipped with couplers coupling automatically on impact, as required by the mandate of the statute, plaintiff upon that showing alone can

not recover in this case. The plaintiff must further show that the failure of the couplers to couple automatically upon impact was the proximate cause of his injury. There is liability in a case of this character only if the failure of the couplers to couple automatically not only create a [fol. 196] condition under which, or an incidental situation in which the employee is injured, but it is necessary that be itself the immediate cause of the injury or the instrumentality through which the injury to plaintiff was directly brought about.

Now, going to this question, which you must pass on: if you should find that the defendant did fail to have the cars mentioned in the evidence, that is, the Pennsylvania car or the Rock Island car, equipped with couplers which coupled automatically on impact, was such failure the proximate cause, in whole or in part, of the plaintiff's injuries?

In determining this question of what was the proximate cause of the accident and plaintiff's injuries, you should consider whether or not the conduct of the plaintiff immediately prior to his accident and injury was a normal reaction to the situation then existing, taking all the circumstances into consideration, of an ordinary prudent workman in plaintiff's position and having the duties to perform which the plaintiff had. If you find that the plaintiff left a place of safety and hurriedly crossed several sets of tracks—four, as I recall the evidence—to the track upon which the two cars mentioned in evidence as having separated were located, but seeing the cars separated or moving to the east, and that he attempted to board one of the moving cars for the purpose of stopping the movement; and if you find that plaintiff's action in proceeding from a place of safety to the point of the accident, [fol. 197] under all the circumstances in evidence, to the point where he was injured, was a normal reaction to the situation created, and that the situation was created by failure of couplers to couple automatically on impact, then the failure of the couplers to couple automatically on impact, as required by the statute, could be considered by you as a proximate cause of plaintiff's injuries.

On the other hand, if you find that plaintiff's action in leaving a place of safety, separated by several sets of

tracks from the track on which the string of cars were moving eastward after having been separated, and attempting to board one of the moving cars for the purpose of stopping it, was not the conduct of an ordinary prudent brakeman under the circumstances, and that an ordinary prudent brakeman in plaintiff's position, having plaintiff's duties to perform, would not have so acted under the circumstances, then you should find that his injury was the result of his own action, as a new and superseding cause, and that the operation of the cars due to failure of the couplers to couple automatically on impact was not the proximate cause of the accident and plaintiff's injuries.

When you return to your jury room, I would suggest this procedure on your part; that you first determine, under the evidence and these instructions, whether or not your verdict is for the plaintiff or for the defendant. If, under the evidence and these instructions, your verdict is [fol. 198] for the defendant, why, your work is then at an end. If, under the evidence and these instructions, your verdict is for the plaintiff, then you will proceed to assess plaintiff's damages.

Damages in a case of this kind can be awarded for compensation only. They must be reasonable and fair, and they must be based on the evidence. And if your verdict is for the plaintiff, in determining the amount that will fairly and reasonably compensate the plaintiff for his injuries and damages sustained on the occasion referred to in evidence, and solely as a result of the injuries due to the accident testified to in the evidence, you may take into consideration the nature, character, extent and probable duration of plaintiff's injuries sustained on the occasion referred to in the evidence; the pain of body and suffering of mind, if any, plaintiff has suffered by reason and on account of said injuries; and such pain of body and suffering of mind, if any, as plaintiff is reasonably certain to suffer in the future by reason and on account of said injuries; and such loss of earnings, if you find there was a loss of earnings, but on this item not to exceed $400.00 per month, as you may believe plaintiff has sustained from the date of his injuries to this date; and such loss of earnings, if any, not to exceed a like sum per month, as you may find plaintiff is reasonably certain to

Copy hereof mailed to Lon Hocker, Jr., c/o Jones, Hocker, Gladney & Grand, 407 N. 8th Street, St. Louis, 1, Missouri, Attorneys for Defendant, this 28th day of October, 1948.

MARK D. EAGLETON,
Attorney for Plaintiff-Appellee.

[fol. 306] Clerk's Certificate:

United States of America
Eastern Division of the
Eastern Judicial District
of Missouri. } ss.

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the above and foregoing to be a full, true and complete transcript (except in so far as the same is restricted by the designation of the record on appeal heretofore set out) of the record and proceedings in cause No. 5773, wherein Floyd Affolder is plaintiff and the New York, Chicago and St. Louis Railroad Company is defendant, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, Missouri, in said Division of said District this 8th day of November in the year of our Lord, Nineteen Hundred and Forty-eight.

JAMES J. O'CONNOR,
Clerk, U. S. District Court,

By JOHN J. JARVIS,
Deputy Clerk.

(Seal)

Filed Nov 9 1948 E. E. Koch Clerk.

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suffer in the future by reason and on account of said injuries.

Your verdict, of course, must be based wholly and [fol. 199] solely on the evidence, and taking these matters into consideration which I have called your attention to.

If your verdict is for the plaintiff, you will fix the amount at such sum and such sum only as you believe will fairly and reasonably compensate the plaintiff for the injuries sustained on the occasion referred to in the evidence.

There has been some reference to the plaintiff in this case—the plaintiff impressed me on the witness stand, he was a personable, likable young man. It is perfectly natural for—as an abstract proposition and aside from this case—to have a sympathetic attitude towards plaintiff for a person who is in his physical condition as it was presented in this court; but it would be a gross miscarriage of justice and a violation of your sworn duty as jurors if you permitted such sympathy to enter into your deliberations or to control your verdict in this case in any manner whatsoever. And I am sure that nobody connected with this case—and that you will not permit yourselves to be so influenced.

You are the sole judges of the credibility of the witnesses. In judging the credibility of the witnesses, weighing and reconciling all their testimony, you may look to the demeanor and manner of the witness testifying, to the interest or lack of interest of any witness in the case, to whether the witness has any bias or feeling or not, to the witness's relationship to any of the parties in interest, and [fol. 200] to the witness's means of knowledge of the facts he testifies to and professes to know and understand; and the witness's chance or opportunity for knowing the facts about which he testifies, and the reasonableness or unreasonableness of the testimony given, and its probability or improbability, and having thus and by these standards carefully considered all these matters, you must place the weight and value on the testimony of each witness and of the evidence as a whole.

Now, use your own good judgment and sound common sense in deciding the issues that have been presented to you in this case. Just as you would in acting on a vital

nd important matter pertaining to your own affairs. Pass n the facts calmly and deliberately, and based solely upon he evidence that has been introduced in this case, and nder these instructions, reach a verdict and dispose of he issues as you have them presented to you.

Remember this: that all twelve of you must agree on our verdict in this case, and when you have agreed on our verdict, you will find two forms of verdict—one to se regardless of how you find. If you find for the plainiff, you will find a verdict form reading as follows:

"We, the jury in the above entitled cause, find the issues herein joined in favor of the plaintiff, Floyd G. Affolder, and against the defendant, New York, Chicago & St. Louis Railroad Company, a corporation, [fol. 201] and assess damages in favor of the plaintiff and against defendant in the sum of ... blank ... Dollars."

And into that blank you should write the amount of our verdict, and then it will be signed by the forelady r foreman, as you may choose as such.

If you find for the defendant, you will find another form f verdict which reads:

"We, the jury in the above entitled cause, find the issues herein joined in favor of the defendant, New York, Chicago & St. Louis Railroad Company, a orporation, and against the plaintiff, Floyd G. Affolder."

And there is a place for the foreman to sign the verdict. Now, there have been a number of exhibits offered in vidence. If you desire any or all of these exhibits, you vill find the bailiff just outside the door of the jury room; otify the bailiff what you want, preferably give him a ote, and any of the exhibits you want will be delivered o you for your use in reaching a verdict in this case.

Exceptions on behalf of the plaintiff?

Mr. Eagleton: Plaintiff wishes to except to that part of he Court's charge wherein it was stated that in determining whether or not the plaintiff was injured as a proximate cause of the failure of said couplers and the separaion mentioned in evidence, the jury should consider [fol. 202] whether or not he then and there acted as an

the actor's conduct is a substantial factor in bring-
[fol. 226] ing about.

"'Comment:

"'a. The rule stated in this Section applies not only to acts done by the person who is harmed or by a third person as a normal response to the situation created by the defendant's negligence, but also to acts of animals reacting thereto in a manner normal to them. . . .'

"'We think these statements clearly and correctly express the rules which should govern the rights of the parties to the present controversy.'

"There are many cases on the subject and while there seems to be no difficulty in determining the rule that should apply under circumstances such as presented by the present record, the difficulty is application of the rule to the case. The language of Mr. Justice Cardozo in Wagner v. International Ry. Co., 232 N. Y. 176, 19 A. L. R. 1, is not without help:

"'Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled ~~victim; it is a wrong~~ also to his
[fol. 227] rescuer . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of the deliverer. He is accountable as if he had . . . there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences; . . . continuity is not broken by the exercise of volition; . . . whether the plaintiff, in going to the rescue as he did, was foolhardy or reasonable in the light of the emergency confronting him was a question for the jury.'

"Most of the decisions on this question since 1923 base their reasoning on the case of Davis v. Wolfe, 263 U. S. 239. The substance of that opinion as it applies to the

present case rules against defendant in so far as its claim is based on the proposition that plaintiff was not engaged in an operation for which the Safety Appliance Act was designed to furnish him protection at the time of the injury. The Court quotes with approval from the opinion in Louisville Railroad v. Layton, 243 U. S. 617:

> " 'While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as [fol. 228] written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.'

"A case in some respects like the present one is New York Cent. R. Co. v. Brown (C. C. A. 6th, 1933), 63 F. 2d 657, where judgment for plaintiff was affirmed. In the Brown case the suit was brought under the Safety Appliance Act. Plaintiff was a brakeman employed by the defendant. Due to the failure of an automatic coupler a car started a down-grade movement. Brown was in a position of safety and seeing the car start, and realizing lest it be stopped it might cause injury, went on the car for the purpose of setting the brake, and had reached a position where he was reaching for the brake [fol. 229] wheel when his head brushed an overhead electric third rail which caused him to fall to the ground and sustain the injuries sued for. In the Brown case, as in this one, violation of the Safety Appliance Act as the proximate cause of the injuries was for ruling. Disposing of it the Court said:

at the close of all the evidence is overruled and defendant's motion for new trial is overruled subject to remittitur ordered in division II of the foregoing memorandum.

RUBEY M. HULEN,
Judge."

[fol. 211] And thereafter, to-wit, on July 28, 1948, the following orders were filed by the Court:

"In the United States District Court
Eastern District of Missouri
Eastern Division

"Floyd B. Affolder,
Plaintiff,
vs.
New York, Chicago and St. Louis Railroad Company, a Corporation,
Defendant.
No. 5773.

"Hulen, Judge.

"Consolidated Final Order.

"Motion of the defendant to set aside verdict and judgment entered thereon and to enter judgment for defendant in conformity with its motion for directed verdict at the close of all the evidence, is overruled. Defendant's motion for new trial is overruled, subject to terms of order for remittitur as contained in division II of the foregoing memorandum as follows:

"Plaintiff will file a remittitur within ten days for the sum in excess of $80,000 in the verdict of the jury, [fol. 212] to-wit, $15,000, failing which defendant's motion for a new trial will be taken as sustained on ground the verdict of the jury is excessive.

RUBEY M. HULEN,
Judge."

[fol. 232] And thereafter, to-wit, on August 2, 1948, the plaintiff and his attorney filed a voluntary remittitur, in words and figures, as follows, to-wit:

"In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

"Floyd G. Affolder, Plaintiff, vs. New York, Chicago and St. Louis Railroad Company, a Corporation, Defendant.	No. 5773. Div. No. 2.

"Voluntary Remittitur.

"Comes now plaintiff in the above entitled cause, Floyd G. Affolder, by his attorney of record and, with refer-
[fol. 233] ence to the order of this Court entered herein on July 28, 1948, plaintiff hereby voluntarily remits the sum of Fifteen Thousand Dollars ($15,000.00) out of the principal sum of damages in the amount of Ninety Five Thousand Dollars ($95,000.00) heretofore awarded to plaintiff by the verdict of the jury and the judgment of the Court in this cause.

(Signed) "FLOYD G. AFFOLDER,
Plaintiff.

(Signed) "MARK D. EAGLETON,
Attorney for Plaintiff.

"Copy of the within Voluntary Remittitur served on Lon O. Hocker, Jr. c/o Jones, Hocker, Gladney and Grand, attorneys for defendant, 407 N. 8th St., St. Louis, Mo. by depositing a copy thereof addressed to said attorneys in the U. S. Mails Postage Prepaid this 2nd day of August, 1948."

(Signed) MARK D. EAGLETON,
Attorney for Plaintiff."

[fol. 234] Certificate.

I, Floyd A. Buchanan, do hereby certify that I was present at the trial of this cause, as entitled and numbered on [original] page 1 of this transcript, that I reported the evidence and proceedings in shorthand, truly and accurately, to the best of my ability, and that [original] pages 1 through 213 hereof contain a true and accurate transcript of my shorthand notes, and of documents contained in the court file.

FLOYD A. BUCHANAN,
Official Court Reporter.

[fol. 295] Record Entry of June 8, 1948.

Now the parties appearing by their respective attorneys and cause having been set for trial on this day and both sides announcing ready for trial, comes also the following jury, to-wit:

John Heines,	Fred Timmons,
Charles J. Bailey,	Louis H. Luth,
Theodore L. Aldrich,	Mrs. Lillian E. Boyer,
Joseph F. Mahoney,	Miss Katherine Rebmann,
Ralph M. Bailey,	Leon W. Clotfelter,
Rogert E. Amelung,	Carrie Dreyer,

twelve (12) good and lawful persons who, having been duly drawn, summoned and chosen, are now sworn well and truly to try the issues herein joined and a true verdict render according to the law and the evidence; whereupon the introduction of evidence in chief on behalf of plaintiff on such trial is commenced and concluded. Motion of defendant for directed verdict in its favor at the close of plaintiff's case is filed and submitted and the ruling of the Court thereon is reserved. Thereupon the introduction of evidence on behalf of defendant is commenced but not being concluded at the hour of adjournment, further proceedings on said trial are postponed until tomorrow at ten o'clock a. m.

Record Entry of June 9, 1948.

Now again come the parties by their respective attorneys and comes also the jury heretofore empaneled and sworn on yesterday on trial of cause; whereupon the introduction of evidence on behalf of defendant on such trial is resumed and concluded. Motion of defendant for a directed verdict at the close of all the evidence is filed and submitted and the ruling of the Court thereon is reserved.

And now the jury, after hearing the arguments of counsel for respective parties and being duly charged by the Court, retires to consider its verdict, which verdict it afterwards returns into Court in words and figures as follows, to-wit:

Floyd G. Affolder,

Plaintiff,

vs.

No. 5773

New York, Chicago & St. Louis Railroad Company, a corporation,

Defendant.

Jury Verdict.

We, the jury in the above entitled cause, find the issues herein joined in favor of plaintiff, Floyd G. Affolder, and against defendant, New York, Chicago & St. Louis Railroad Company, a corporation, and assess damages in favor of plaintiff and against defendant in the sum of Ninety five thousand Dollars ($95,000.00).

LOUIS H. LUTH,
Foreman.

June 9, 1948

which verdict is by the Court ordered filed and is filed.

[fol. 296] It is therefore, pursuant to the finding and verdict of the jury as aforesaid, Ordered and Adjudged that plaintiff Floyd G. Affolder have and recover of defendant New York, Chicago & St. Louis Railroad Company, a cor-

poration, the sum of Ninety-five Thousand Dollars ($95,000.00) as his damages herein, together with his costs and charges herein expended, for all of which judgment, costs and charges let execution issue in favor of plaintiff against defendant on praecipe filed therefor by plaintiff.

[fol. 299] Order.

(Filed August 11, 1948.)

Defendant's Notice of Appeal filed. Defendant presents its supersedeas bond signed by United States Guarantee Company of New York as surety, in the amount of Ninety Thousand Dollars ($90,000.00) which bond is examined, approved and ordered filed, and the execution on the judgment appealed from is ordered stayed pending the appeal.

ROY W. HARPER,
Judge.

[fol. 300] Order.

(Filed September 14, 1948.)

On oral application, defendant's time for filing record on appeal extended from September 20, 1948 to October 30, 1948.

Dated this 14th day of September, 1948.

JONES, HOCKER, GLADNEY & GRAND,
and
BENJAMIN ROTH,
Attorneys for defendant,
407 North Eighth Street,
St. Louis, Missouri.

Approved:

ROY W. HARPER,
District Judge.

[fol. 301] Order.

(Filed September 20, 1948.)

Order of September 14, 1948, heretofore entered extending defendant's time for filing the record on appeal is hereby amended so as to provide as follows:

On oral application, defendant's time for filing record on appeal and docketing the appeal in the Court of Appeals is hereby extended from September 20, 1948 to October 30, 1948.

JONES, HOCKER, GLADNEY & GRAND,
and
BENJAMIN ROTH,
Attorneys for Defendant.

ROY W. HARPER,
District Judge.

[fol. 302] Order.

(Filed October 18, 1948.)

On oral application, defendant's time for filing record on appeal and docketing the appeal in the Court of Appeals, heretofore extended to October 20, 1948, is further extended to November 9, 1948.

JONES, HOCKER, GLADNEY & GRAND,
and
BENJAMIN ROTH,
407 North Eighth Street,
St. Louis 1, Missouri,
GArfield 3850,
Attorneys for Defendant.

RUBEY M. HULEN,
District Judge.

[fol. 303] Bond on Appeal.

(Filed August 11, 1948.)

Whereas on June 9, 1948 the District Court of the United States for the Eastern Division of Eastern Judicial Dis-

trict of Missouri in a certain cause now pending in said court between Floyd G. Affolder, plaintiff, and New York, Chicago and St. Louis Railroad Company, defendant, being No. 5773 of Division No. 2 thereof, rendered judgment in favor of plaintiff and against the defendant in the amount, after voluntary remittitur entered August 2, 1948, of Eighty Thousand Dollars ($80,000.00), and

Whereas the defendant has appealed from said judgment to the United States Circuit Court of Appeals for the Eighth Judicial Circuit,

Now, Therefore, the undersigned, New York, Chicago and St. Louis Railroad Company, as principal, and United States Guarantee Company of New York, as surety, do by these presents acknowledge themselves firmly bound unto the plaintiff in the sum of Ninety Thousand Dollars ($90,000.00).

Now the condition of this bond is such that if the appellant New York, Chicago and St. Louis Railroad Company shall diligently prosecute said appeal, and if said judgment shall be reversed, or if the appellant shall satisfy such judgment in full together with costs, interest, and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and if the appellant, or the surety on appellant's behalf, shall satisfy in full such modification thereof and such costs, interest and damages as the appellate court may adjudge and award, then this obligation shall be null and void, otherwise to have full force and effect.

Witness our hands this 11th day of August, 1948.

NEW YORK, CHICAGO, AND ST. LOUIS RAILROAD COMPANY,

By LON HOCKER, JR.,
One of its agents and attorneys.

UNITED STATES GUARANTEE COMPANY OF NEW YORK,

By R. W. SELLERS,
Attorney in Fact. (Seal)

[fol. 304] Designation of Record.

(Filed October 25, 1948.)

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint, filed February 19, 1948.

2. Defendant's answer to complaint, filed March 18, 1948.

3. The transcript of the evidence at trial June 8th and 9th, 1948, a copy of which is filed herewith.

4. Defendant's motion for a directed verdict at close of plaintiff's case. (Included in transcript.)

5. Defendant's motion for a directed verdict at close of all the evidence. (Included in transcript.)

6. Verdict of the jury (in transcript) and the judgment entered June 9, 1948.

7. Motion of defendant to set aside verdict and judgment entered thereon and to enter a judgment for defendant in conformity with its motion for a directed verdict at the close of all the evidence, or, in the alternative, for a new trial (filed June 16, 1948). (Included in transcript.)

[fol. 305] 8. Court's Consolidated Final Order, filed July 28, 1948. (Included in transcript.)

9. Plaintiff's voluntary remittitur, filed August 2, 1948. (Included in transcript.)

10. Notice of appeal, filed August 11, 1948.

11. This Designation of Record.

12. Order of September 14, 1948, extending the time for filing the record on appeal, and docketing appeal.

13. Order of October 18, 1948, extending the time for filing the record on appeal, and docketing appeal.

JONES, HOCKER, GLADNEY & GRAND,
and
LON HOCKER, JR.,
407 North Eighth Street,
St. Louis 1, Missouri,
GArfield 3850,
Attorneys for Appellant.

Copy hereof mailed to Mark D. Eagleton, 3746 Grandel Square, St. Louis 8, Missouri, Attorney for Plaintiff, this 25 day of October, 1948.

LON HOCKER, JR.

[fol. 305-A] Appellee's Designation of Additional Portions of Record.

(Filed November 8, 1948.)

In addition to the matter previously designated by appellant herein, the appellee-plaintiff hereby designates the following portions of the record and proceedings to be contained in the record on appeal in this action:

1. The opening statements of counsel for both plaintiff and defendant.

2. The arguments to the jury of counsel for both plaintiff and defendant.

This is designation of additional portions of the record.

MARK D. EAGLETON,
Attorney for plaintiff-appellee,
3746 Grandel Square,
St. Louis 8, Missouri.

[fol. 200] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Counsel for Appellant.)

United States Court of Appeals

Eighth Circuit.

New York, Chicago & St. Louis Railroad Company, a corporation, Appellant,

No. 13,858. vs.

Floyd G. Affolder.

The Clerk will enter my appearance as Counsel for the Appellant.

LON O. HOCKER, JR.,
407 North Eighth St.,
St. Louis (1), Mo.

(Endorsed): Filed in U. S. Court of Appeals, Nov. 10, 1948.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

MARK D. EAGLETON,

WM. H. ALLEN,
3746 Grandel Square,
St. Louis, 8, Missouri.

(Endorsed): Filed in U. S. Court of Appeals, Nov. 16, 1948.

[fol. 201] (Order of Submission.)

March Term, 1949.

Wednesday, March 9, 1949.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Lon Hocker, Jr., for appellant, continued by Mr. William H. Allen for appellee, and concluded by Mr. Lon Hocker, Jr., for appellant.

Thereupon, this cause was submitted to the Court on the printed record and the briefs of counsel filed herein.

[fol. 202] (Opinion.)

United States Court of Appeals

For The Eighth Circuit.

No. 13,858.

New York, Chicago and St. Louis Railroad Company, a Corporation,

Appellant,

vs.

Floyd G. Affolder,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 10, 1949.]

Mr. Lon O. Hocker, Jr., (Messrs. Jones, Hocker, Gladney & Grand were with him on the brief) for Appellant.

Mr. William H. Allen (Mr. Mark D. Eagleton was with him on the brief) for Appellee.

Before Sanborn, Riddick, and Collet, Circuit Judges.

Collet, Circuit Judge, delivered the opinion of the Court.

The plaintiff recovered judgment for $95,000.00 for personal injuries for an alleged violation of the provision of the Safety Appliance Act that:

ordinarily prudent person would have acted under the same or similar circumstances. The plaintiff takes the position that that is an improper declaration of law, in that that injects into this case the issues of plaintiff's contributory negligence, which could not be submitted to the jury, and that it is not a proper test of what the plaintiff should have done under the same circumstances; and, further, that in that connection the Court, unwittingly, I think, indicated that if there was a finding of fact that plaintiff did not act with ordinary prudence, that then that, in and of itself, set up a new and superseding cause. That is the first exception.

Now, one other exception, and I am through. And plaintiff excepts to that portion of the Court's charge wherein the Court charged the jury that plaintiff could not recover in the event defendant's servant Tielker failed to open the knuckle of the Pennsylvania hopper car and thereby caused the failure of the couplers to perform their function and to couple automatically by impact; it being the plaintiff's position that any failure on the part of Tielker, who was in charge of this particular operation for the defendant, to properly adjust said safety appliances so that they would react efficiently and properly was not only a negligence act on the part of the said Tielker, if it occurred, but it was also at one and the same time a failure on the part of the defendant to then and there [fol. 203] provide and furnish the plaintiff with couplers on said cars coupling automatically by impact, and it makes no difference, under the law, or should make no difference, whether said couplers were defective or merely failed to function because defendant adopted an improper method with reference to the operation of said couplers, which improper method had the effect of rendering said devices ineffective.

Mr. Hocker: The defendant excepts to so much of your Honor's charge as instructs the jury that in order to discharge the burden of proving a breach of its duty, the plaintiff is not required to prove the existence of any defect in the coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact. Such a declaration requires that the defendant's couplers couple whenever an impact is made, whereas, the statute

only requires that the defendant not haul or use cars not equipped with couplers coupling automatically by impact, which under the law means capable of coupling automatically by impact when properly set by the train crew for that purpose.

Further, I except to the definition of the Safety Appliance defect contained in the statute as using the words "not coupling by impact" as implying the same thing, as not explicit in this portion of the charge just adverted to; that the statute properly construed should be given to the jury as failure to—hauling or using cars not equipped with [fol. 204] couplers capable of coupling on impact.

Otherwise, I think your Honor's charge is all right.

The Court: Mr. Eagleton, I used the term normal person, and I also used the term "an ordinary prudent person." Now, if you are insisting on the objection to the use of the term "ordinary prudent person," and you think the jury would not understand that as used synonymous with "normal person," I will—

Mr. Eagleton: No. Your Honor did use both. I was merely stating the proposition of law . . . failure to use prudence . . . in other words, he does not have to measure up, as I see it, under the statute, to that degree of care.

The Court: No, I did not use it in that respect. I used it with the intent to indicate what a normal person would do. Now, if you don't think the jury understands the use of the term "ordinary prudent person" to mean the same as "normal person," I will impress that matter on them, that I used those words synonymously.

Mr. Eagleton: Oh, well, I thought there might be some confusion in the minds of the jury as to whether they might be different things.

The Court: Well, I will briefly tell them.

Ladies and gentlemen of the jury, in giving you an instruction with reference to the plaintiff leaving a place of safety in crossing tracks over to where a movement had [fol. 205] started to the east, for the purpose of getting on one of the cars and stopping it, as he testified in one place, I used the term, "as an ordinary prudent person

does that," and in another place I used the term "a normal person." I used those terms to all mean the same thing, and I want you to understand that. I intended to have you understand that I was trying to put a standard of what a normal person would do. Do you all understand that? Very well.

Any further exceptions?

Mr. Eagleton: No further exceptions, your Honor.

The Court: Very well. You may retire now to consider your verdict.

At this point, 3:05 p. m., the jury retired to their jury room to consider of their verdict.

Mr. Hocker: I think your Honor understood what I meant by my exception, but if it is proper—

The Court: Which one?

Mr. Hocker: The first one, your Honor, with respect to the question of how much he has to prove in order to sustain his burden of proof.

The Court: Oh, well, I don't think there is any question about what it was. He takes the position that—the plaintiff takes the position, as I understand it, that he separation of the cars makes a prima facie case of failure to [fol. 206] comply with the statute.

Mr. Hocker: Well, yes, your Honor.

The Court: And you take the position that he must go farther and show that the separation was due to some defect in the coupling?

Mr. Hocker: Well, that is correct, but further than that, and as assuming that he is right, or your first proposition correctly states the law, that is, that it does create a prima facie case when there is a failure to couple. The instruction given by the Court says in effect that that prima facie case is conclusive on the defendant; it does not give rise to an inference of having failed to comply with the Safety Appliance Act, but is a conclusive determination of there not being a safety—of there being a safety appliance de-

fect. Your Honor says that the plaintiff need only prove that any coupler on any car failed to couple automatically by impact, in order to discharge the burden of proving a breach of this duty. Now, that may be so, so far as getting past the demurrer, to defeat the motion for directed verdict, I would say, but it is in effect making the prima facie case an irrebuttable case, so far as the charge is concerned.

The Court: Well, I further put an amendment on Mr. Eagleton's instruction, to the effect that if they found that separation was not due to the failure to comply with the statute, or even if they did not comply with the statute, [fol. 207] if it was not the proximate cause, then their verdict should be for defendant, and I told the jury that they must consider the instructions as a whole, and I believe they have understood them. I hope so.

Mr. Hocker: All right. I just wanted to clarify it

The Court: Yes. I think I understand your position. I think you made your complete record on it.

Mr. Hocker: Yes.

The Court: You gentlemen see that the clerk gets the exhibits, please.

Mr. Hocker: Yes, your Honor. I have them here. Your Honor, how about this coupler? That was exhibited to the jury. It was not marked.

The Court: We will leave that to your care.

Mr. Hocker: All right, sir.

The Court: No objection?

Mr. Eagleton: No objection, your Honor.

The Court: Announce a temporary recess.

And Thereafter, at 5:28 p. m., on the same day, the jury returned its verdict, in words and figures, as follows, to-wit:

[fol. 208] "In the District Court of the United States
Eastern Division, Eastern Judicial
District of Missouri.

"Floyd G. Affolder,
Plaintiff,
vs.
New York, Chicago & St. Louis Railroad Company, a corporation,
Defendant.
No. 5773.

"Jury Verdict.

"We, the jury in the above entitled cause, find the issues herein joined in favor of plaintiff, Floyd G. Affolder, and against defendant, New York, Chicago & St. Louis Railroad Company, a corporation, and assess damages in favor of plaintiff and against defendant in the sum of Ninety five thousand & 00 Dollars ($95,000.00).

(Signed) "LOUIS H. LUTH,
Foreman.

June 9, 1948."

And thereafter, to-wit, on June 16, 1948, the defendant, by its counsel, filed the following motion:

(Omitting formal caption.)

Motion of Defendant to Set Aside Verdict and Judgment Entered Thereon and to Enter a Judgment for Defendant in Conformity With Its Motion for
[fol. 209] a Directed Verdict at the Close of All the Evidence or, in the Alternative, for a New Trial.

"Now comes the defendant and moves the court to set aside the verdict and judgment entered thereon and to

enter a judgment in favor of the defendant in conformity with its motion for a directed verdict at the close of all the evidence, or, in the alternative, to grant defendant a new trial, because:

"1. There is no substantial evidence to support the verdict and judgment entered thereon.

"2. The amount of the verdict and judgment entered thereon is excessive.

"3. The amount of the verdict and judgment entered thereon is against the weight, and the manifest weight, of the evidence.

"4. The verdict is so grossly excessive as to show that it was the result of bias, passion and prejudice on the part of the jury.

"5. The Court erred in admitting incompetent, irrelevant, immaterial and prejudicial evidence offered by the plaintiff.

"6. The court erred in excluding competent, relevant and material evidence offered by the defendant.

"7. The court erred in the charge given to the jury in the respects designated by the defendant in its exceptions thereto, and particularly in charging the jury (a) [fol. 210] that it was not necessary for the plaintiff to prove a specific defect in the couplers, and (b) that 'the plaintiff, in order to discharge the burden of proving a breach of this duty . . . need only prove that any such coupler did in fact fail to couple automatically by impact', thereby charging the jury in effect that the plaintiff was entitled to recover if the coupling was not made regardless of the cause of such failure to couple.

"8. The court erred in permitting the witness Tielker to express an expert opinion on a subject for which he had not been shown to be qualified, over the objection of the defendant.

"9. The court erred in refusing to permit the defendant to prove by the witness Tielker that although he had

been examined at length by one of the claim agents of the defendant immediately following the accident concerning the knowledge of the witness of the circumstances surrounding the accident, the witness Tielker did not mention to the claim agent the bent lift lever bracket and his difficulty in operating the lift lever, concerning which he testified at the plaintiff's request at the trial.

"JONES, HOCKER, GLADNEY & GRAND,
and
(Signed) LON HOCKER, JR.,
Attorneys for Defendant,
407 North [Eghth] Street,
St. Louis (1), Missouri,
Garfield 3850.

"Copy of foregoing motion mailed to Mark D. Eagleton, 3746 Grandel Square, St. Louis (8), Mo., attorney for plaintiff, this 16th day of June, 1948.

(Signed) JAMES C. JONES, JR.,
Atty. for Deft."

[fol. 211] And thereafter, to-wit, on July 9, 1948, the said motion was argued as submitted, and defendant granted to July 15, 1948, to submit brief.

[fol. 212] "In the United States District Court
Eastern District of Missouri
Eastern Division.

"Floyd B. Affolder,
Plaintiff,
vs.
New York, Chicago and St. Louis Railroad Company, a Corporation,
Defendant.
No. 5773

"Appearances:

For Plaintiff: Mark D. Eagleton of St. Louis, Mo.

For Defendant: Jones, Hocker, Gladney & Grand, and Lon Hocker, Jr., of St. Louis, Mo.

"Hulen, Judge.

Memorandum and Order on Motion of Defendant to Set Aside Verdict and Judgment Entered Thereon and Enter a Judgment for Defendant in Conformity With Its Motion for Directed Verdict at the Close of all the Evidence, or in the Alternative for a New Trial.

"Plaintiff was employed by defendant as a switchman in its yards in Fort Wayne, Indiana. On the night of September 24, 1947 defendant was engaged in a switching [fol. 213] operation of freight cars. Two of the cars failed to couple automatically by impact, with the result that part of the cut of cars farthest from the engine, by reason of the failure to couple automatically on impact, commenced to move down grade on the switch track. It was plaintiff's duty to stop such a movement. Plaintiff was in a place of safety some distance from the track the movement was on, and upon seeing the cars moving immediately started toward them at a rapid gait, with the intention of going on the cars and setting the brake to stop the movement and avoid damage that might otherwise result. When he had reached a point near where he intended to board one of the cars, for some unexplained reason he slipped or tripped and fell. His right leg went over the rail, the car passed over it, and he received injuries which

resulted in its amputation, leaving a stump about four inches long. At the time of injury he had been employed by defendant about seven and one-half years. He was earning approximately $400 per month. He was thirty-five years of age. He testified his leg had given him constant pain since injury was received and he had lost some thirty pounds in weight. A doctor called by plaintiff testified the scar on the stump was adherent and painful, that there was a 'hot spot' at the end of the nerve, and that further surgery will be required to shorten the bone and remove scar tissue to relieve the pain and permit plaintiff to wear an artificial limb. The doctor was guarded in his opinion [fol. 214] as to extent of success with which plaintiff could wear an artificial leg. Because of the shortness of the stump a special type of 'table' artificial limb would be required. The flexion of the limb is markedly reduced. There was no injury suffered to any other part of his body. The jury returned a verdict for plaintiff for $95,000. Plaintiff's case was based on the Safety Appliance Act (45 U. S. C. A. Secs. 1-46)—that defendant permitted cars to be used on lines controlled by it which were not equipped with couplers coupling automatically on impact.

"Defendant argued and has briefed three assignments of error:

"(1) The charge to the jury failed to submit defendant's theory of the case.

"(2) The verdict is excessive.

"(3) There is a failure of proof that violation of the Safety Appliance Act was the proximate cause of plaintiff's injury.

I.

"That portion of the charge complained of reads as follows:

" 'The Court instructs the jury that under the law in this case the defendant had an absolute and continuing duty not to haul or use on its line any car not equipped with couplers coupling automatically by [fol. 215] impact, and it was not only the duty of the defendant to provide such couplers, but it was under the

> further duty to keep them in such operative condition that they would always perform their functions. Therefore, the plaintiff, in order to discharge the burden of proving a breach of this duty, is not required to prove the existence of any defect in any such coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact.'

"By brief defendant states its position with reference to the charge as follows:

> " 'This instruction, which was not modified or conditioned by other parts of the charge, was in effect a direction to find for the plaintiff. There was no question that the cars did not couple upon impact. The only question was as to the cause of the failure. Defendant contended that there was no inherent defect in either coupler which caused them not to couple, but a failure of Tielker, the switchman, to open the knuckles before the impact. Your Honor's charge as quoted deprived defendant of this theory of defense, for plaintiff had only to "prove that any such coupler did in fact fail to couple automatically by impact." '

"The charge must be considered as a whole. The jury was so instructed. We cannot agree with defendant the [fol. 216] charge was susceptible of interpretation by the jury as a 'direction to find for the plaintiff', or that the charge 'deprived defendant of this theory of defense.' When considered as a whole we believe defendant's 'theory of defense' was presented to the jury. As set out in defendant's brief the case was tried by defendant and its defense was 'that there was no inherent defect in either coupler which caused them not to couple, but a failure of Tielker, the switchman, to open the knuckles before the impact' which was the cause and failure of the coupling to couple on impact. If the plaintiff's injuries resulted from the action of Tielker, as urged by defendant, negligence of a fellow servant, to-wit Tielker, was the proximate cause of plaintiff's injury and not violation of the Safety Appliance Act by defendant.

"Going directly to defendant's claim that its theory of defense was not submitted and therefore defendant was

'deprived' of it, following that part of the charge isolated and quoted by defendant in its brief the following appears in the charge:

> " 'Now, I charge you in this case that if you find and believe from the evidence that at the time and place mentioned in evidence, defendant was hauling or using on its lines one or more cars equipped with couplers which did not couple by impact, and that by reason thereof a separation occurred between the [fol. 217] Pennsylvania hopper car and the Rock Island box car, *and* that said separation was due to a failure on the part of the couplers of either car *to function properly and to couple automatically on impact*, then in that event you are instructed that the defendant violated the Safety Appliance Act that I have referred to.'

"It will be seen from this portion of the charge that coupled conjunctively with the requirement that the jury find that the cars were equipped with couplers that did not couple automatically on impact, the jury must also find that the separation 'was due to a failure on the part of the couplers of either car to function properly. . . .' The jury was further charged:

> " 'On the other hand, if you should find and believe from the evidence that the separation of the cars, that is, the Pennsylvania car and the Rock Island car, was due to some other cause, that a failure to provide couplers coupling automatically by impact did not cause it, or that the separation of the cars, regardless of its cause, was not the proximate cause of plaintiff's injuries, then your verdict in this case should be for the defendants.'

"Following the above paragraph the jury was told that plaintiff did not found his claim upon negligence, and with respect to the conduct of Tielker, which defendant [fol. 218] claims was the cause of the failure of the couplers to couple automatically on impact, the jury was specifically instructed:

> " 'But similarly, plaintiff has no right to recover in this suit for any negligence of the defendant, if

any has been shown; so you can not hold the defendant liable in this case *for any act or failure to act of Tilker,* who said he was a pin man in the engine crew, and as I recall, he testified to opening the coupling so it would couple on contact, but he said that the car to which it was being shoved or kicked, or any other employee, or any defect or obstruction in the condition of the yards, that is not in this case.'

"Counsel for plaintiff and defendant argued their respective positions fully before the jury. The charge was in conformity with their argument. We believe the subject was covered sufficiently by the charge that there could be no misunderstanding by the jury and defendant is without any basis for this assignment of error.

II.

"The verdict in this case is large. The question is whether it is so excessive as to call for interference by the Judge—a course we adopt only if it appears the jury disregarded the instructions as to measure of damages. Bearing in mind the extent of plaintiff's injuries, his education, station in life, and character, and viewing the [fol. 219] evidence as to damages most favorable to plaintiff in the light of the rule that amount of damages is primarily for the jury to determine, we believe his earning capacity, on recovery, should be at least approximately 40% of what it was prior to injury.

"In the case of Gulf, C. & S. F. Ry. v. Moser, 275 U. S. 133, the Supreme Court referred to the case of Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117, as announcing an applicable rule to compute damages recoverable for the deprivation of future benefits, and referring to the Kelly case said:

"'The interpretation approved by us has become an integral part of the statute [Federal Employers' Liability Act]. It should be accepted and followed.'

"In the Kelly case the Supreme Court said:

"'. . . in computing the damages recoverable for the deprivation of future benefits, the principle of

limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.'

"In determining the present value of payment for future earnings the Court said:

"'. . . But, as a rule, and in all cases where [fol. 220] it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making of the award.

"'We do not mean to say that the discount should be at what is commonly called the "legal rate of" interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least, without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment.'

"'Ordinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages (Citing cases) and the putting out of money at interest is at this day so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, since a reasonable man, even from selfish motives, would probably gain some money [fol. 221] by way of interest upon the money recovered. Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available.'

"Plaintiff, by brief, to sustain the award of the jury, as to the amount of future earnings represented in the verdict presents figures based on an annuity discount rate of 2½%. Following that formula, plaintiff, being thirty-five years of age, with an income of $400 per month, and an expectancy of thirty-seven years plus, and assuming a loss in earning capacity of approximately 60%, plus loss of earnings to the date of trial, the sum of $70,000 for damages sustained by plaintiff under this heading would not be so excessive as to justify, in our opinion, the Judge in declaring the jury disregarded the instructions on the measure of damages.

"In addition to loss of earnings plaintiff is entitled to such sum as would reasonably compensate him for past and future pain and suffering and loss of leg, as a matter of disfigurement, embarrassment and inconvenience.

"The cases cited by the parties do not help a great deal in deciding the question presented. On the other hand we believe there should be some attempt at uniformity rather [fol. 222] than a total disregard of the judgment of other courts. In 1944 the District Court for the Southern District of New York, in McKinney v. Pittsburgh & L. E. R. Co., 57 F. Supp. 813, had before it a case under the Federal Employers' Liability Act where plaintiff, 43 years of age, with earnings of approximately $2800 a year, suffered the loss of both feet between the ankle and the knee. The verdict of $130,000 was reduced to $100,000. In the same year the District Court for the Eastern District of New York, in Cunningham v. Pennsylvania R. Co., 55 F. Supp. 1012, considering the subject of excessive verdict in a case under the Federal Employers' Liability Act, had before it a plaintiff 38 years old, with income of $2900 per year, where a verdict of $60,000 had been rendered. Plaintiff was a brakeman and lost his right leg three and one-half inches above the knee. At the time of trial, eight months after injury, his leg was sufficiently healed to be ready for an artificial limb. In reducing the verdict from $60,000 to $40,000[1] the Court said:

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1 "'We assume that a verdict for a larger sum would have been justified for plaintiff as of 1944, in view of plaintiff's approximately 25% larger earnings and injuries much more aggravated than in the Cunningham case.'

"'. . . it is pertinent to note that research of counsel and the court has unearthed no case of an [fol. 223] allowance of $60,000 for the loss of one leg.'

"Faced with a demand for an answer as to what is reasonable and fair compensation for an injured person such as plaintiff under the circumstances of this case, we are bound to reply, who can determine within any degree of accuracy what amount of money will compensate plaintiff for the pain and suffering he has sustained and in all probability will undergo in the future, and the other intangibles involved in the question. We cannot escape the belief in this case that the sum agreed upon by the jury exceeds what has heretofore been determined to be a fair sum, and we say this with what we consider due allowance for the change in economic conditions that has resulted in substantial reduction in purchasing power of the dollar for the necessities of life.[1] If no Court had approved a a verdict of $60,000 for loss of a limb up to 1944, a verdict of $95,000 four years later is excessive. Considering all the circumstances referred to and injuries sustained by plaintiff, a sum of $80,000 in the present case would be fair compensation to the plaintiff and any amount above $80,000 would be excessive.

[fol. 224] Order.

"Plaintiff will file a remittitur within ten days for all sums in excess of $80,000.00.

III.

"Defendant's assignment that the evidence fails to sustain plaintiff's charge that violation of the Safety Appliance Act was the proximate cause of plaintiff's injuries presents a close question under the authorities. There is no dispute in the record how plaintiff came by his injuries. Due to failure of two of the cars in a switching movement to couple automatically by impact, that portion of the cut of cars farthest from the engine started to move away

1 See United States Department of Labor, Bureau of Labor Statistics, Monthly Labor Review, June 1940, Vol. 66, No. 6. Using period 1935-39 as a base representing 100, consumers price index for moderate-income families in large cities, average for all items (food, apparel, rent, house-furnishings): 1944=125.5; 1948, May 15=170.5.

from the engine because of grade of the track. Plaintiff had a duty under the circumstances to stop the movement. On seeing the cars moving he did not hesitate but started immediately toward the moving cut of cars at a rapid gait, with the intention of going on the cars and stopping the movement by setting the brake on one of the cars. While rushing for the movement, for some unaccounted reason, he was caused to fall and his right leg went under the wheels of one of the cars, causing his injuries. He had almost reached the car he intended to board at the time of his fall. It is the position of defendant that plaintiff was not, at the time of injury, engaged in an operation for which the Safety Appliance Act was designed to furnish him protection. Defendant argues it was not the [fol. 225] separation of the cars which caused plaintiff's injury. When plaintiff approached the cars he was not interested 'in the coupling device, but in the brake', and that when he saw the movement of the cut of cars 'the situation would have been identical, so far as Affolder's duties and reactions were concerned, whether the separation was intentional or accidental.' Defendant seeks a ruling, the separation was 'an incidental situation' in which the accident, otherwise caused, results in the injury to plaintiff.

"The rules governing determination of proximate cause as set forth in Restatement of the Law of Torts, Vol. II, §§ 430-443, is approved by the Eighth Circuit in Chicago, M., St. P. & Pac. R. Co. v. Goldhammer, 79 F. 2d 272, l. c. 274:

> "' "Sec. 435. Foreseeability of Harm or Manner of its Occurrence.
>
> "' "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw, nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." '
>
> "'Sec. 443. Dependent Intervening force.
>
> "'An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 45 U.S.C.A., Section 2.

Upon motion for new trial a remittitur of $15,000.00 was ordered and made. From the judgment, defendant appeals. Three grounds for reversal are asserted. First, that there was error in the instructions; second, that if the Safety Appliance Act was violated, such violation was not the proximate cause of plaintiff's injury; and third, that the verdict was excessive.

Plaintiff lived at Fort Wayne, Indiana, and was employed by defendant in interstate commerce as a switchman in defendant's yards at Fort Wayne at the time of his injury on September 24, 1947. He was one of a crew of five men comprising a switch engine crew engaged in the classification of cars in the defendant's yards at Fort Wayne. The switch tracks involved herein were substantially parallel and ran east and west, sloping toward the east. In classifying, or sorting, the cars in the yard six or seven cars were run onto the east-bound main switch from the west and stopped approximately fifteen car lengths west of the east end of that switch track. Plaintiff, the "field man" of the crew, had the duty of setting the brakes on cars spotted and attending to duties away from the engine. The other switchman stayed with the engine and such cars as might be attached thereto. Plaintiff set the brake on one of these six or seven cars in order that they would remain in place as others were added. The process of sorting or classifying the cars in the yard proceeded until 25 cars had been accumulated on this particular track. The west car of this group of 25 was a Rock Island car. When the Rock Island car was put on this track, it was "kicked in"—an operation consisting of the engine giving it a

"bump" from the west, starting it rolling east on the east-bound main switch, then cutting it loose from the engine and allowing it to roll on down to the other cars and automatically couple to them by impact. When the Rock Island car was cut loose from the engine the coupler at its west end was opened by the other or "head" switchman in order that the next car that was added would automatically couple to it. The next car to be added was a Pennsylvania hopper car. When it was "kicked in", the coupler on its east end was opened by the "head" switchman. If the couplers were operating properly and either the one on the west end of the Rock Island car or the one on the east end of the Pennsylvania car was open the cars would automatically couple and become locked together, hence the opening of the coupling on the east end of the Pennsylvania car at that time was a precaution against the possibility that the Rock Island car's west coupler had become closed by its impact with the other 24 at the time it was "kicked" in against them. When the coupler on the Pennsylvania car was opened the head switchman testified that the lever "bound", or stuck, requiring two or three efforts on his part to open it. Later the lever bracket was found to be bent. There was testimony pro and con as to whether that would interfere with the automatic working of the coupler. The head switchman was positive in his testimony that although he had some difficulty in doing so, he put the coupler on the east end of the Pennsylvania car in proper position to operate on impact. The Pennsylvania car was "kicked" down to the Rock Island car, but unknown to the crew at that time, it did not couple. Three other cars were added to the group on this track in either two or three separate operations. When the last, or twenty-ninth, car was added, plaintiff was completing an operation of riding a car down on the fifth track south of the east-bound main track. This last operation incident to the 29 cars consisted of the engine shoving a car east against those already on the east-bound main, then shoving the

entire group east along the track to make room for the twenty-ninth car. But when the engine had shoved the entire group a sufficient distance east and stopped, a separation occurred between the Rock Island car and the Pennsylvania car and all of the 25 cars east of the Pennsylvania car left those coupled to the engine and continued to roll down the track to the east. When they had gone approximately two car lengths plaintiff saw they were loose and, having been frequently instructed to stop cars under such circumstances, ran north across the intervening tracks toward the loose cars for the purpose of setting a brake on one of them to stop them. When he got almost to the east end of the west, or Rock Island, car, and approximately two or three feet from it, he stepped on something that rolled under his foot and caused him to fall forward under the car. The wheels of the car ran over his right leg and so mangled it that it was necessary to amputate it, leaving a stump only four inches in length.

The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, if it saw fit, properly infer that defendant had violated the Safety Appliance Act in not equipping its cars with "couplers coupling automatically". That is the law. *Chicago, R. I. & P. R. Co.* v. *Brown*, 229 U.S. 317; *Southern Ry. Co.* v. *Stewart*, 119 F.2d 85; *Minneapolis & St. Louis R. R. Co.* v. *Gotschall*, 244 U.S. 66. The trial court so understood it. And there was no dispute concerning the fact that these cars did not couple automatically. Defendant contended at the trial that this was not because they were not properly equipped with automatic couplers but was more likely caused by the closing of the coupler on the Rock Island car on its impact when it was kicked in, a contingency which the testimony indicated was not unusual, and the failure of the head switchman to open the coupler on the Pennsylvania car when it was sent down against the Rock Island.

If both couplers were closed, there could have been no automatic coupling of the cars on impact even if the couplers were in proper condition.

The error assigned to the trial court's instruction is that by the charge on this point the court unintentionally mislead the jury by instructing in effect that the separation of the cars was not only prima facie evidence of a violation from which the jury could infer a failure to properly equip the cars with automatic couplers in proper condition, but actually amounted to an instruction that all that it was necessary for the jury to find in order to entitle plaintiff to a verdict (if the failure to couple was the proximate cause of injury) was that the cars did not couple—a conceded fact. Thus, the defendant contends, it was deprived of its defense that the cars were properly equipped with proper automatic couplers and that the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened. The question is therefore not one of law but of construction of the court's instructions on this subject.

At the conclusion of the charge, defendant specifically raised the question it now pursues. The applicable portions of the charge are as follows:

"Now, bear in mind that these instructions are given to you as a whole. Don't attempt to separate them and use part of them in determining the issues and disregarding the remainder, because in that way your verdict would not be applicable. They are given to you for use and application to the case and to guide you in your deliberations as a whole, and I hope as a whole that they will be intelligible to you.

* * * * * * *

"This case is based upon a charge by the plaintiff that the defendant failed to comply with the federal law, or a federal statute, known as the Federal Safety Appliance Act, and, briefly, this law prohibits all railroads operating

in interstate commerce to use any car in interstate commerce that is not equipped with couplers which couple automatically on impact.

"It is the position of the plaintiff in this case, as I understand the record, that on the occasion in question, the 24th day of September, of last year, he was a brakeman in the defendant's yard; that on this main east and west track there was a separation of the cars on that track. The numbers of the two cars where the separation occurred were given to you, but I prefer to use the names of the cars, because I think that is much easier for you to remember. One of the cars was referred to as a Pennsylvania car, and another car was referred to as a Rock Island car; and between these two cars the coupling, for some reason, and that is for you to determine, was not connected, and they separated, and the string of cars to the east of the break, some twenty-five cars started a movement to the east, and the plaintiff, who was some four or five tracks to the south of the track upon which this movement was located, some 3:00 o'clock in the morning, the searchlights in the yards, some evidence about the obscuring of vision by beam or smoke from cranes, but he saw the movement of these cars start to the east.

"As I recall his testimony, he said that he hurried over there, and that he reached a point very close to the car that he intended to get on; I believe he said some two or three feet; that is not exactly material, whether it was two or three feet, but anyhow, for some reason, so he testified, his foot stepped on some object, or for some reason he slipped, or fell, when he was attempting to board the car, and his leg passed over the rail, under the wheel, and received injuries which caused this amputation.

"He testified that he was going to the car to get on it for the purpose of setting the brake and stopping the movement of the car.

"Now, it is the position of the plaintiff, as I understand it, that the separation of the cars which started this movement which the plaintiff testified he was going to attempt to stop, and which he testified was a part of his duties, it is the position of the plaintiff that the separation was due to the failure of the defendant to equip the cars with

couplers that couple automatically on impact. And that, second, the failure that I have just referred to was the proximate cause of the plaintiff's injuries.

"Now, on the other hand, as I understand it to be the position of the defendant, no denial but what there was a separation of cars, but the defendant denies that the separation was due to any failure on its part to equip or that the cars were being used without being equipped with couplers which couple automatically on impact. And, second, that regardless of what caused those two cars to separate, it is further the position of the defendant that the failure of the cars to remain together, or, I might put it, a separation of the cars, was not the proximate cause of the plaintiff's injuries.

"Now, that, as I understand it, states the respective positions of the parties. So the case resolves itself down to a very simple issue: a decision on two questions by you:

Did the defendant use cars in interstate commerce on the occasion in question that were not equipped with couplers that coupled automatically on impact, first?

Second, if the defendant violated the statute in the respect I have just referred to, was such violation the proximate cause of the plaintiff's injury?

• • • • • • •

"Under the law as I have referred to, in this case the defendant had an absolute and continuing duty not to haul or use on its lines any car not equipped with couplers coupling automatically on impact. And it was not only the duty of the defendant to provide such couplers, but it was under the further duty to keep them in such operative condition that they would always perform their function.

"The plaintiff, in order to discharge the burden of proving a breach of defendant's duty, is not required to prove the existence of any defect in such coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact.

"Now, I charge you in this case that if you find and believe from the evidence that at the time and place men-

tioned in evidence, defendant was hauling or using on its lines one or more cars equipped with couplers which did not couple automatically on impact, and that by reason thereof a separation occurred between the Pennsylvania hopper car and the Rock Island box car, and that said separation was due to a failure on the part of the couplers of either car to function properly and to couple automatically on impact, then in that event you are instructed that the defendant violated the Safety Appliance Act that I have referred to.

"And if you further find and believe from the evidence that such violation, if any, directly and proximately caused, either in whole or in part, plaintiff's injuries and damages, if any he sustained, as referred to in the evidence, then your verdict will be in favor of the plaintiff and against the defendant in this case.

"On the other hand, if you should find and believe from the evidence that the separation of the cars, that is, the Pennsylvania car and the Rock Island car, was due to some other cause, that a failure to provide couplers coupling automatically on impact did not cause it, or that the separation of the cars, regardless of its cause, was not the proximate cause of plaintiff's injuries, then your verdict in this case should be for the defendant.

"Now, you will understand from what I have said to you that the plaintiff does not found his action and his claim upon negligence upon the part of the defendant; no negligence charged; the charge is a violation of an absolute statutory duty; and under the statute upon which the suit is based, and which I have referred to, if you find there was a breach of such duty, the defendant railroad can not defend the cars upon the ground that that plaintiff was also negligent, or that the accident was caused by negligence of some fellow servant of plaintiff, or that plaintiff assumed a risk of any operation engaged in; so the question of negligence upon the part of the plaintiff is not in this case. Any question of contributory negligence upon the part of the plaintiff is not in this case. Any question of negligence of a fellow servant is not in this case. Any question of the assumption of risk by the plaintiff is not in this case. Those matters you should not concern yourselves with in arriving at a verdict in this case.

"But similarly, plaintiff has no right to recover in this suit for any negligence of the defendant, if any has been shown; so you can not hold the defendant liable in this case for any act or failure to act of Tielker, who said he was a pin man in the engine crew (and as I recall, he testified to opening the coupling so it would couple on contact to, he said, with the car to which it was being shoved or kicked), or any other employee, or any defect or obstruction in the condition of the yards; that is not in this case.

"Now, I reiterate, the plaintiff charges the defendant with liability in this case based upon the violation of a federal statute, namely, a statute which requires and places the duty upon the defendant that it shall not haul or use cars that are not equipped with couplers that couple automatically on impact. The defendant denies the charge of the plaintiff in this respect.

• • • • • • •

"Now, the burden of proof rests upon the plaintiff to sustain the charge he has made in this case by a preponderance of the evidence; that is, by a greater weight of the evidence; that is, these two propositions: that either the Pennsylvania or the Rock Island car referred to in evidence were not equipped with couplers coupling automatically on impact as required by law, and that the plaintiff's injuries were directly and proximately caused by reason of such failure to equip said cars, or either of them, with the couplers coupling automatically on impact.

• • • • • • •

"• • • More specifically, although you may find that both or either of the cars referred to were not equipped with couplers coupling automatically on impact, as required by the mandate of the statute, plaintiff upon that showing alone can not recover in this case. The plaintiff must further show that the failure of the couplers to couple automatically upon impact was the proximate cause of his injury. There is liability in a case of this character only if the failure of the couplers to couple automatically not only create a condition under which, or an incidental situation in which the employee is injured, but it is necessary that be itself the immediate cause of the injury or the in-

strumentality through which the injury to plaintiff was directly brought about.

"Now, going to this question, which you must pass on: if you should find that the defendant did fail to have the cars mentioned in the evidence, that is, the Pennsylvania car or the Rock Island car, equipped with couplers which coupled automatically on impact, was such failure the proximate cause, in whole or in part, of the plaintiff's injuries?

"In determining this question of what was the proximate cause of the accident and plaintiff's injuries, * * * if you find * * * that the situation was created by failure of couplers to couple automatically on impact, then the failure of the couplers to couple automatically on impact, as required by the statute, could be considered by you as a proximate cause of plaintiff's injuries.

"On the other hand, if you find that plaintiff's action * * * was not the conduct of an ordinary prudent brakeman under the circumstances, * * * then you should find that his injury was the result of his own action, as a new and superseding cause, and that the operation of the cars due to failure of the couplers to couple automatically on impact was not the proximate cause of the accident and plaintiff's injuries."

Of course the charge must be considered in its entirety. "It is not difficult to destroy almost any charge by isolating certain limited expressions therein, but the charge must be considered as a whole with a view of determining the impression conveyed thereby to the jury." *S. S. Kresge Co.* v. *McCallion*, 58 F.2d 931 (8 Cir.).

We find no difficulty in reaching the conclusion that the charge made clear to the jury that defendant's liability depended upon its failure to equip its car or cars with couplers coupling automatically on impact. And the court properly instructed the jury that proof of the separation of the cars would support a finding that the Act had been violated. The difficulty arises from the rather strong inference created by the charge that all the jury need find to

reach a verdict for plaintiff was that the cars did separate. We are unable to escape the conclusion that the instruction was not sufficiently clear and definite in that respect. It contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i.e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty and therefore could find this issue for plaintiff on that evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes. Where reliance for the proof of the ultimate fact rests entirely on circumstantial evidence it is ordinarily essential that the effect of the evidence and its proper use be explained. That is not only true in res ipsa cases but is especially true in cases such as this where only one circumstance is relied upon to support the inference. Plaintiff's counsel made the argument to the jury that:

"The plaintiff's duty is satisfied as long as you find that the couplers on this occasion when put in position to operate properly did not make or did not come together by impact. That is all there is to it, in so far as that particular phase of the case is concerned. I hope I make myself clear on that."

The instruction following that argument, that under the law the defendant had an absolute and continuing duty not to use any car which was not equipped with couplers coupling automatically on impact and maintained in such operative condition that they *would always* perform their function and that plaintiff was not required to prove more than that "any coupler did in fact fail to couple automatically by impact", very probably gave the jury the impression that since that was all plaintiff need show, that was all the jury need find. If it did get that impression, consideration of other possible causes for the separation was eliminated because it was undisputed that the couplers did not couple these two cars.

[fol. 228] (Order denying Petition of Appellee for Rehearing.)

May Term, 1949.

Thursday, June 9, 1949.

Petition for rehearing filed by counsel for appellee in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

June 9, 1949.

(Motion of Appellee for Stay of Issuance of Mandate.)

Comes now Floyd G. Affolder, appellee in the above entitled cause, and states that he desires and intends to apply to the Supreme Court of the United States for a writ of certiorari to review the decision and judgment of this Court in said cause as shown by the Court's opinion rendered herein on May 10, 1949, and moves and prays that the Court make and enter an order staying and withholding the mandate of this Court in this cause pending appellee's said application for said writ, in accordance with the rules of this Court in such cases made and provided.

Respectfully submitted,

MARK D. EAGLETON,
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St. Louis, 8, Missouri.

WM. H. ALLEN,
408 Olive Street,
St. Louis, 2, Missouri,
Counsel for Appellee.

(Endorsed): Filed in U. S. Court of Appeals, June 18, 1949.

[fol. 229] (Order Staying Issuance of Mandate.)

May Term, 1949.

Monday, June 20, 1949.

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is

The trial court was of the opinion, expressed in a memorandum opinion in ruling on the motion for a new trial, *Affolder* v. *New York, C. & St. L. R. Co.*, 79 F. Supp. 365, that the injunction given to the jury that it must find that the separation "was due to a failure on the part of the couplers of either car *to function properly* and to couple automatically on impact", taken with the further charge that if the jury found that the separation was due to some other cause and that "a failure to provide couplers coupling automatically by impact did not cause it", was sufficient to prevent any misunderstanding. We are unable to agree. The initial reaction from the entire charge is an impression that all that was necessary for the jury to find to reach the conclusion that there was a violation of the Act was that there was a separation. The bare intercalation of the words "to function properly" would not be likely to remove it. Nor do we think that telling the jury that their verdict should be for defendant if it found "a failure to provide couplers coupling automatically by impact did not cause the separation" did so The couplers did not couple automatically on impact. That was a self-evident conceded fact. We are of the opinion that the jury could well have understood the charge taken as a whole to mean that since the couplers did not couple automatically on impact, since defendant had the absolute duty to furnish cars with couplers that did do so, the fact that these did not do so conclusively established defendant's violation of its duty to furnish cars with couplers that did.

Defendant's contention that its motion for a directed verdict should have been sustained because there is no evidence to support a finding that the failure of the couplers to couple on impact was the proximate cause of plaintiff's injury is without merit. One purpose of having efficient automatic couplers on trains is to hold the train together. These did not, and their failure to do so set in motion a chain of events without which there would have been no

now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 20, 1949.

[fol. 230] (Clerk's Certificate.)

United States Court of Appeals

Eighth Circuit.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed record on which the appeal from the District Court of the United States for the Eastern District of Missouri was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein New York, Chicago & St. Louis Railroad Company, a corporation, was Appellant and Floyd G. Affolder was Appellee, No. 13,858.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 20th day of June, A. D. 1949.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

injury and because of which there was. The coming to rest of the Pennsylvania car and the subsequent movements affecting the group of cars did not break the continuity of the wrong. The separation of the cars resulted proximately from their failure to couple on the first impact. Plaintiff's act in undertaking to stop the cars was a natural one and an act that was neither rash for foolhardy. The continuity of the cause was not broken by plaintiff's exercise of his own volition in going from a point of safety in the exercise of his duty. "It has long been settled that the chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence * * *. To determine whether there was a continuous succession of events leading proximately from fault to injury, the test is not whether the plaintiff was acting in performance of his duty when injured, but whether his act was a normal response to the stimulus of a dangerous situation created by the fault." *New York Cent. R. Co.* v. *Brown*, 63 F.2d 657, l.c. 658. See also *Davis* v. *Wolfe*, 263 U.S. 239; *McAllister* v. *St. Louis Merchants' Bridge Terminal Ry. Co.*, 324 Mo. 1005; 25 S.W.2d 791; *Anderson* v. *Baltimore & O. R. Co.*, 89 F.2d 629; *Cusson* v. *Canadian Pac. Ry. Co.*, 115 F.2d 430; *Erie R. Co.* v. *Caldwell*, 264 Fed. 947; *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U.S. 617; *Minneapolis & St. Louis R. R. Co.* v. *Gotschall*, 244 U.S. 66. The rule applied in *St. L. & San Fran. R. R.* v. *Canarty*, 238 U.S. 243; *Lang* v. *New York Central R. R.*, 255 U.S. 455; *Reetz* v. *Chicago & E. R. Co.*, 46 F.2d 50; *Bobango* v. *Erie R. Co.*, 57 F.2d 667; and *Carter* v. *Atlanta & St. A. B. Ry. Co.*, 170 F.2d 719, that where a violation of the Safety Appliance Act is not a proximate cause of the injury but merely creates an incidental condition or situation in which the accident otherwise caused results in the injury there can be no recovery, is not applicable to the facts of this case.

[fol. 231] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 200

FLOYD G. AFFOLDER, Petitioner,

vs.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The assignment of error that the verdict is excessive is not properly addressed to this Court. *Public Utilities Corp. of Arkansas* v. *McNaughton*, 39 F.2d 7; *Sun Oil Co.* v. *Rhodes*, 15 F.2d 790; *Lincoln* v. *Power*, 151 U.S. 436; *New York, L. E. & W. R. Co.* v. *Winter*, 143 U.S. 60; *Kurn* v. *Stanfield*, 111 F.2d 469; *Kroger Grocery & Baking Co.* v *Yount*, 66 F.2d 700.

Because of the error in the charge heretofore noted, the judgment is set aside and the cause is remanded for a new trial.

Judge Riddick concurs in the result.

[fol. 217] (Judgment.)

United States Court of Appeals
for the Eighth Circuit.

May Term, 1949.

Tuesday, May 10, 1949.

New York, Chicago and St. Louis Railroad Company, a corporation, Appellant,
No. 13,858. vs.
Floyd G. Affolder.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, set aside with costs; and that the New York, Chicago and St. Louis Railroad Company, a corporation, have and recover against Floyd G. Affolder the sum of Seven Hundred Eight and 03/100 ($708.03) Dollars for its costs in this behalf expended and have execution therefor.

And it is further Ordered that this Cause be, and the same is hereby, remanded to the said District Court for a new trial.

May 10, 1949.

United States Court of Appeals,

EIGHTH CIRCUIT.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a Corporation,	Appellant,	No. 13,858. Civil.
v.		
FLOYD G. AFFOLDER,	Appellee.	

Appeal from the District Court of the United States for the Eastern District of Missouri,
Hon. Rubey M. Hulen, Judge.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Judges of the United States Court of Appeals for the Eighth Circuit:

Comes now Floyd G. Affolder, appellee in the above entitled cause, and files this, his petition for a rehearing of said cause by this Court, praying that the Court with draw and set aside its opinion, order and judgment herein rendered and entered on May 10, 1949, whereby this Court ordered that the judgment of the District Court herein be set aside and that the cause be remanded for a new trial, and further praying that appellee be granted a rehearing

of said cause in this Court; and as grounds for his said petition appellee respectfully states:

This Honorable Court in its said opinion rendered and filed on the 10th day of May, 1949, inadvertently overlooked material matters of law and fact, as shown by said opinion, as follows:

I.

The Court in its opinion (p. 11) states:

> "Of course the charge must be considered in its entirety.
>
> • • • • • • •
>
> "We find no difficulty in reaching the conclusion that the charge **made clear** to the jury that defendant's liability depended upon its failure to equip its cars with couplers coupling automatically on impact."

And the Court's opinion (pp. 6-10) sets out the pertinent portions of the charge, showing that the trial court over and over again properly instructed the jury that to find for plaintiff the jury must find that the defendant failed to have its cars mentioned in the evidence, or one of them, equipped with couplers coupling automatically by impact, and that such failure, if any there was, was the proximate cause of plaintiff's injuries. **These were the ultimate facts to be found to entitle plaintiff to a verdict.** But this Court, nevertheless, condemned the charge on the ground (p. 11) that it was not sufficiently clear and definite in respect to the facts to be found by the jury in order to reach a verdict for plaintiff; that is, whether the jury was thereby required to find that defendant failed to equip its cars with couplers coupling automatically by impact, or whether the jury was merely required to find that the Pennsylvania car and the Rock Island car separated.

We submit that if, as this Court has soundly ruled, **"the charge made clear to the jury that defendant's liability depended upon its failure to equip its car or cars with couplers coupling automatically on impact,"** the jury could not conceivably have inferred or deduced from the charge, or any isolated language thereof, that liability on the part of the defendant could arise from the fact alone that the cars separated. The Court's view of the charge in this connection was apparently induced by the Court's inadvertent misconception of the law applicable to the trial of cases arising under the Safety Appliance Act to which we hereinafter refer.

II.

And following this, the Court in its opinion (pp. 11, 12), after referring to the proof adduced by plaintiff, states as follows:

> "It (the charge) contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty and therefore could find this issue for plaintiff on that evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes."

We respectfully submit that the theory upon which this portion of the opinion proceeds is plainly unsound. In a case such as this, for a violation of the mandatory provisions of the Safety Appliance Act, where there is positive, direct proof that the coupler in question was put in position to operate but failed to effect a coupling on impact, the plaintiff's case does not rest upon mere circumstantial evidence. In the situation mentioned, in order for the jury to find the ultimate fact that the defendant was

using a car or cars not equipped with couplers coupling automatically by impact, in violation of the statute, **the jury need only believe and find that the coupler was in position to operate properly and that, on impact of the cars, the coupling failed to make. From a finding of such facts a violation of the statute inevitably follows.** It has long ago been thoroughly settled that the Safety Appliance Act places an **absolute mandatory duty** upon interstate carriers to have and keep their cars constantly equipped with couplers coupling automatically by impact; that the test of the observance of such duty is the performance of the appliance, and that the failure of a coupler to work at any time suffices as proof that the statute was violated.

Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 320, 321;

Minneapolis & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66;

San Antonio & A. P. Ry. Co. v. Wagner, 241 U. S. 476;

Louisville & Nashville R. Co. v. Layton, 243 U. S. 617;

Southern Railway Co. v. Stewart (8 Cir.), 119 F. (2) 85;

Atchison, Topeka & Santa Fe R. Co. v. Keddy, 28 F. (2) 952;

Chicago, St. P. M. & O. Ry. Co. v. Muldowney (8 Cir.), 130 F. (2) 971.

It follows that the portion of the opinion last above quoted, holding, in effect, that the failure of a coupler to couple automatically by impact on a fair trial is nothing more than a mere circumstance, serving only to give rise to the permissible inference that the Act was violated, is in direct conflict with the cases above cited.

III.

And following that portion of the opinion referred to above, the Court (p. 12) further says:

> "Where reliance for the proof of the ultimate fact rests entirely on circumstantial evidence, it is ordinarily essential that the effect of the evidence and its proper use be explained. That is not only true in res ipsa cases, but is especially true in cases such as this where only one circumstance is relied upon to support the inference."

The unsoundness of this readily appears. It is not disputed that the Pennsylvania car did not effect a coupling with the Rock Island car, and by reason thereof the cars later separated. Tielker, the field man, testified that he opened the knuckle on the east end of the Pennsylvania car so as to properly prepare the coupler for coupling with the Rock Island car, and that the coupler on the east end of the Pennsylvania car was in good operating position. In that situation all the jury needed to find to return a verdict for plaintiff was **that this coupler was put in position to operate properly, as Tielker said it was, and that the coupling failed to make.** From a finding of such facts a violation of the statute inevitably followed.

But this Court, in that portion of the opinion last quoted above (p. 11), overlooking the applicable rule just stated, treated the failure of the couplers to couple, even though the knuckle had been properly prepared, **as mere circumstantial evidence of the violation of the statute,** and on that premise held that the charge should have contained an explanation of the legal effect of the proof and of the failure of the cars to couple automatically on impact, "and the permissible use which the jury could make of it," saying that "where reliance for the proof of the ultimate fact rests upon circumstantial evidence it is ordi-

narily essential that the effect of the evidence and its proper use be explained."

We respectfully submit that this is a novel and utterly untenable theory in a case involving the coupler provisions of the Safety Appliance Act. **With the coupler on the Pennsylvania car prepared for coupling the legal effect of proof of the failure of the cars to couple automatically on impact was to establish a violation of the statute. It was direct, positive proof that the defendant was using on its line a car not equipped with couplers coupling automatically by impact.** Here proof of that ultimate fact does not rest merely on circumstantial evidence. This is the theory upon which the District Court charged the jury below. And obviously there was no occasion for any further explanation as to the legal effect of the proof mentioned. **The trial court in its charge made all the explanation proper under the law.**

And it was, we submit, plain error for this Court to liken this case, in respect of the instructions to be given to the jury, to one wherein negligence is sought to be established by inference from the happening of an unusual occurrence, through the application of the res ipsa loquitur rule as applied to negligence cases. The unsoundness of this theory is implicit in the law as declared in Chicago, R. I. & P. R. Co. v. Brown (229 U. S. 317, 320, 321); Minneapolis & St. L. R. R. Co. v. Gottschall (244 U. S. 66, 67), and the other authorities cited under subdivision II of this petition, supra. And if, as soundly ruled by this Court through Judge Gardner in **Southern Railway Co. v. Stewart,** supra (119 F. [2] 85, 87), **"a violation of the statute is shown by proof that cars on a fair trial failed to couple automatically by impact,"** there can be no room for instructions such as are given in res ipsa loquitur cases wherein **negligence** is sought to be inferred from the mere

happening of an unusual occurrence. Typical instructions in res ipsa loquitur cases, such as are approved by the Supreme Court of Missouri, would tell the jury, in behalf of the plaintiff, that the facts of the unusual occurrence are sufficient circumstantial evidence to warrant a finding that the defendant was negligent, and on the other hand, in behalf of the defendant, would tell the jury: "You should not find that the defendant was negligent from the mere fact of the occurrence shown by the plaintiff's evidence, if you find and believe from all the evidence in the case that the defendant was not negligent." **Harke v. Haase**, 335 Mo. 1104, 75 S. W. (2) 1001, 1004.

That such instructions have no place in a case such as this is, we submit, entirely clear. Here the proof showed that the coupler, though properly prepared for coupling, failed to couple on impact. **That proof showed a violation of the statute. Southern Ry. Co. v. Stewart, 119 F. (2) 85, 87.** The fact that the coupling did not make was undisputed. And consequently to return a verdict for this plaintiff, on the ground that defendant was using on its line a car or cars not coupling automatically by impact, the jury had only to find that Tielker did prepare the knuckle on the east end of the Pennsylvania car as he said he did. **And there was neither occasion nor room legally for any statements to the jury about circumstantial evidence as though this case were to be tried as a negligence case wherein the res ipsa loquitur rule is invoked.**

Indeed, this is not a negligence case at all, as the District Court plainly told the jury, but involves merely the questions whether defendant was using on its line a car not equipped as the statute requires, and, if so, whether that was the proximate cause of plaintiff's injury. The petition in this case pleaded a **specific** statutory violation, the proof thereof was direct and positive, and this was made **clear** to the jury by the charge of the District Court.

IV.

And following that portion of the opinion last above quoted, the Court (p. 12) criticizes the following argument of plaintiff's counsel to the jury:

> "The plaintiff's duty is satisfied as long as you find that the couplers on this occasion **when put in position to operate properly** did not make or did not come together by impact. That is all there is to it, insofar as that particular phase of the case is concerned. I hope I make myself clear on that." (Emphasis ours.)

The Court's criticism of this argument results from the Court's theory, set forth in the opinion, that the failure of a coupler to operate efficiently constitutes mere circumstantial evidence of a violation of the statute. But that, we submit, is plainly not the law. For the reasons and upon the authorities cited above, it is quite clear, we submit, that this bit of argument of plaintiff's counsel was entirely proper. **For it is true that plaintiff was entitled to a verdict if the jury found that the couplers, when put in position to operate properly, did not make, that is, couple, by impact.**

Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 320, 321;
Minneapolis, etc., R. Co. v. Gotschall, 244 U. S. 66.

V.

Also, on page 4 of the opinion, the Court says:

> "The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, **if it saw fit**, properly **infer** that defendant had violated the Safety Appliance Act in not equipping

its cars with 'couplers coupling automatically.' That is the Law. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317; Southern Ry. Co. v. Stewart, 119 F. 2d 85; Minneapolis & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66." (Emphasis ours.)

This does not correctly indicate appellee's position. And we submit that there is no occasion to deal with the fact that the couplers failed to couple automatically on impact **without at the same time reckoning with the proof that the coupler on the east end of the Pennsylvania car was properly prepared for coupling.** And if that coupler was properly prepared for coupling and the couplers failed to couple on impact, **then such failure did not constitute mere circumstantial evidence from which the jury might or might not properly infer that the Act was violated. On the contrary, the plaintiff, under the settled Federal Law, was entitled to have the jury plainly told, as it was below, that if the couplers, when in position to properly operate, did fail to couple automatically by impact, then the defendant violated the statute and plaintiff was entitled to recover if such violation was the proximate cause of his injuries.**

In conclusion, we respectfully say, that for the reasons shown above, this opinion, if permitted to stand, will, for one thing, work a great and unjust hardship upon this plaintiff, in that it will deprive plaintiff of the fruits of a verdict and judgment won by him, as we firmly believe, upon a fair trial below, free from error. **But this will be by no means all the effect that this opinion will have if allowed to stand. It goes much deeper than that.** It is bound to cause uncertainty and confusion in the matter of the making of a charge to the jury by the District Court in this case and doubtless in many other cases arising under the Act; uncertainty and confusion where none existed before. And, if followed by district courts, it must inevitably result in depriving railroad workers of proper

jury trials in actions under the coupler provision of the Safety Appliance Act, and thereby take away a goodly portion of the relief that Congress has afforded such workers. **Bailey v. Central Vermont Ry.**, 319 U. S. 350, l. c. 354; **Blair v. Baltimore & Ohio R. Co.**, 323 U. S. 600, l. c. 602.

Wherefore, appellee prays that the opinion heretofore filed herein be withdrawn, and that the order and judgment reversing and remanding this cause be set aside and that appellee be granted a rehearing of this cause.

Respectfully submitted,

MARK D. EAGLETON,
WM. H. ALLEN,
Counsel for Appellee.

Certificate of Counsel.

Mark D. Eagleton and Wm. H. Allen, counsel for appellee, do hereby certify that the above and foregoing petition of the appellee for a rehearing of said cause is filed in good faith and is believed by them to be meritorious.

.....MARK D. EAGLETON.....
Mark D. Eagleton.

.....WM. H. ALLEN.....
Wm. H. Allen.

(Endorsed): Filed in U. S. Court of Appeals, May 24, 1949.